# TRANSCRIPT OF RECORD.

## SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1910

No. 607

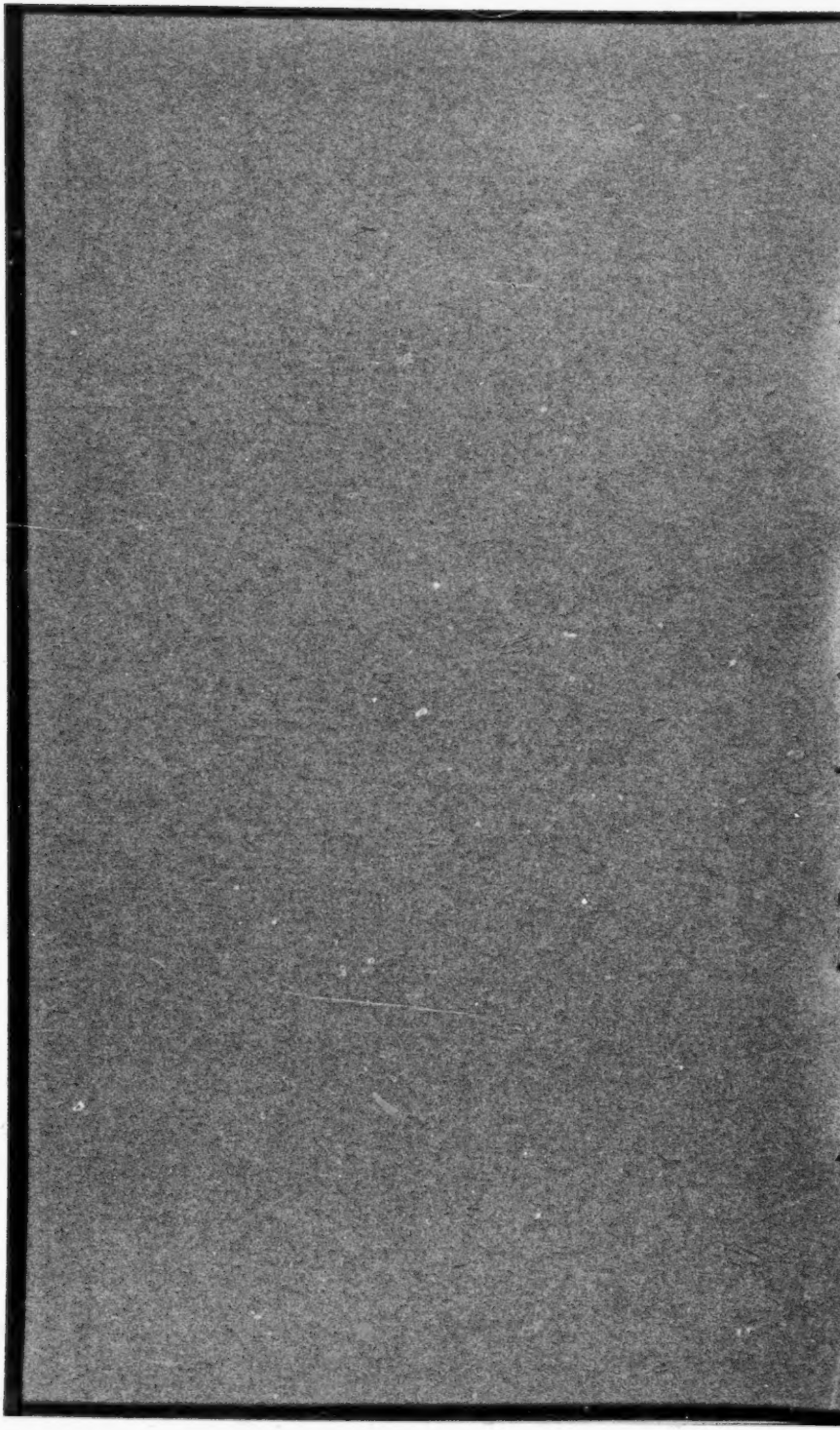
THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HARVEY C. MILLER AND MORRIS F. MILLER.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

FILED MAY 10, 1911.



# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1910.

## No. 1062.

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THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

HARVEY C. MILLER AND MORRIS F. MILLER.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

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95184—11——1

1 United States Circuit Court. Special term. November, 1910.

UNITED STATES OF AMERICA,
*Southern District of Georgia, Eastern Division.*

The grand jurors of the United States, selected, chosen, and sworn in and for the Eastern Division of the Southern District of Georgia, upon their oaths present:

First count.

That before and on the second day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the thirtieth day of May, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners' Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, from Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia and in said Southern District of Georgia;

That before and on the second day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the seventeenth day of January, in the year of our Lord one thousand nine hundred and eight, the Seaboard Air Line Railway was a corporation duly organized and existing under and by virtue of the laws of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and divers other States to the grand jurors aforesaid unknown; that said Seaboard Air Line Railway owned a line of railway from Savannah, in the State of Georgia, and in said Southern District of Georgia, to Jacksonville, in the State of Florida, which said line of railway was then and there being operated for said corporation by S. Davies Warfield and R. Lancaster Williams, receivers appointed by the United States

2 Circuit Court for the said Southern District of Georgia in the suit of the Seaboard Air Line Railway against the Continental Trust Company, as trustee, etc.; that said corporation and said receivers were engaged in the transportation of property in interstate commerce as common carriers wholly by railroad over the said railway from Savannah, as aforesaid, to Jacksonville, as aforesaid; that the said corporation common carriers and said receivers, throughout the period of time aforesaid, were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers, and said receivers, for a continuous carriage and

shipment of property in interstate commerce over their said routes, connecting at Savannah, in the State of Georgia, aforesaid, from Philadelphia, aforesaid, to Jacksonville, aforesaid; that so the said corporation common carriers and said receivers, during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia, aforesaid, to Jacksonville, aforesaid, over their said connecting routes; and that so the said Merchants & Miners' Transportation Company and the said Seaboard Air Line Railway, and the said S. Davies Warfield and R. Lancaster Williams, receivers as aforesaid, were common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that before and during the periods of time aforesaid schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers,

3 specifying the names of said corporation common carriers and said receivers, and showing, among other things, the joint rate and the only lawful rate which the said common carriers had established and which was in force throughout the said periods over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route and in interstate commerce as aforesaid from Philadelphia aforesaid to Jacksonville aforesaid, to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners' Transportation Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Seaboard Air Line Railway and said receivers of said Seaboard Air Line Railway, common carriers as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said periods said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said period had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia, aforesaid, to Jacksonville, aforesaid, and that the said joint rate was not in any manner changed by the said common carriers, or either of them, during the said periods;

That during the said periods Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said periods and at the several times of the

committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller, of the said firm of L. F. Miller & Sons;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that during the period of time aforesaid,
4 to wit, on the tenth day of January, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Seaboard Air Line Railway, whereby such property, to wit, wheat in sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid, as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvice C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid, over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a certain shipment of wheat in sacks, to wit, fifty thousand pounds, that being a carload lot under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid, well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid, over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by the said common carriers as aforesaid.

And so the grand jurors aforesaid, upon their oaths afore-
5 said, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia, Pennsylvania, to Jacksonville, Florida, as aforesaid, by said common car-

riers aforesaid, for and on behalf of the said L. F. Miller & Sons, at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Second count.

That before and on the second day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the thirtieth day of May, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, from Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia;

That before and on the seventeenth day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the twenty-second day of February, in the year of our Lord one thousand nine hundred and eight, the Seaboard Air Line Railway was a corporation organized and existing under and by virtue of the laws of the States
6 of Virginia, North Carolina, South Carolina, Georgia, Florida, and divers other States to the grand jurors aforesaid unknown; that said Seaboard Air Line Railway owned a line of railway from Savannah, in the State of Georgia, and in said Southern District of Georgia, to Jacksonville, in the State of Florida, which said line of railway was then and there being operated for said corporation by S. Davies Warfield and R. Lancaster Williams and Edward C. Duncan, receivers appointed by the United States Circuit Court for the said Southern District of Georgia in the suit of the Seaboard Air Line Railway against the Continental Trust Company, as trustee, etc.; that said corporation and said receivers were engaged in the transportation of property in interstate commerce as common carriers wholly by railroad over the said railway from Savannah, as aforesaid, to Jacksonville, as aforesaid; that the said corporation common carriers and said receivers, throughout the period of time aforesaid, were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers and said receivers, for a continuous carriage and shipment of property in interstate commerce over their said

routes, connecting at Savannah, in the State of Georgia, aforesaid, from Philadelphia aforesaid to Jacksonville aforesaid; that so the said corporation common carriers and said receivers, during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway and the said S. Davies Warfield and R. Lancaster Williams and Edward C. Duncan, receivers as aforesaid, were common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act;

7 And the grand jurors aforesaid, upon their oaths aforesaid, do further present that before and during the periods of time aforesaid schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of said corporation common carriers and said receivers, and showing, among other things, the joint rate and the only lawful rate which the said common carriers had established and which was in force throughout the said periods over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route, and in interstate commerce as aforesaid from Philadelphia aforesaid to Jacksonville aforesaid, to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Seaboard Air Line Railway, and said receivers of said Seaboard Air Line Railway, common carriers as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said period said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said periods had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers, or either of them, during the said periods;

That during the said periods Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said periods and at the several times of the committing by

them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said
8 Morris F. Miller of the said firm of L. F. Miller & Sons:

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that during the period of time aforesaid, to wit, on the twenty-eighth day of January, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Seaboard Air Line Railway, whereby such property, to wit, wheat in sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid, as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a certain shipment of wheat in sacks, to wit, thirty thousand pounds, that being a carload lot under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to
9 Jacksonville aforesaid, over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by the said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia, Pennsylvania, to Jacksonville, Florida, as aforesaid, by said common carriers aforesaid for and on behalf of

the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers, as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Third count.

That before and on the second day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the thirtieth day of May, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia and in said Southern District of Georgia;

That before and on the seventeenth day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the twenty-second day of February, in the year of our Lord one thousand nine hundred and eight, the Seaboard Air Line Railway was a corporation organized and existing under and by virtue of the laws of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and divers other States to the grand jurors aforesaid unknown; that said Seaboard Air Line Railway owned a line of railway from Savannah, in the State of Georgia and in said Southern District of Georgia, to Jacksonville, in the State of Florida, which said line of railway was then and there being operated for said corporation by S. Davies Warfield and R. Lancaster Williams and Edward C. Duncan, receivers appointed by the United States Circuit Court for the said Southern District of Georgia in the suit of the Seaboard Air Line Railway against the Continental Trust Company, as trustee, etc.; that said corporation and said receivers were engaged in the transportation of property in interstate commerce as common carriers wholly by railroad over the said railway from Savannah, as aforesaid, to Jacksonville, as aforesaid; that the said corporation common carriers and said receivers, throughout the period of time aforesaid, were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers and said receivers, for a continuous carriage and shipment of property in interstate commerce over their said routes,

connecting at Savannah, in the State of Georgia aforesaid, from Philadelphia aforesaid to Jacksonville aforesaid; that so the said corporation common carriers and said receivers, during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, over their said connecting routes; and

11 that so the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway and the said S. Davies Warfield and R. Lancaster Williams and Edward C. Duncan, receivers as aforesaid, were common carriers, subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that before and during the periods of time aforesaid, schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of said corporation common carriers and said receivers, and showing among other things the joint rate and the only lawful rate which the said common carriers had established and which was in force throughout the said periods over their said through route for the transportation of certain property, to wit, wheat in sacks, over their said through route and in interstate commerce as aforesaid, to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Seaboard Air Line Railway, and said receivers of said Seaboard Air Line Railway, common carriers as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said period said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said periods had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to

12 Jacksonville aforesaid and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said periods;

That during the said periods Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said periods and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned

were well known to said Harvie C. Miller and said Morris F. Miller of the said firm of L. F. Miller & Sons;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the period of time aforesaid, to wit, on the fourth day of February, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Seaboard Air Line Railway; whereby such property, to wit, wheat in sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia,
13 to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a certain shipment of wheat in sacks, to wit, thirty thousand pounds, that being a carload lot, under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by the said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid, by the common carriers as aforesaid, subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia, Pennsylvania, to Jacksonville, Florida, as aforesaid, by said common carriers aforesaid for and on behalf of the said L. F. Miller & Sons at a less rate than that named

in the tariffs published and filed by said common carriers, as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

14 And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Fourth count.

That before and on the second day of January, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the thirtieth day of May, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia.

That before and on the twenty-second day of February, in the year of our Lord one thousand nine hundred and eight, and throughout the period of time from that day until and on the thirtieth day of May, in the year of our Lord one thousand nine hundred and eight, the Seaboard Air Line Railway was a corporation organized and existing under and by virtue of the laws of the States of Virginia, North Carolina, South Carolina, Georgia, Florida, and divers other States to the grand jurors aforesaid unknown; that said Seaboard Air Line Railway owned a line of railway from Savannah, in the State of Georgia, and in said Southern District of Georgia, to Jacksonville, in the State of Florida, which said line of railway was then and there being operated for said corporation by S. Davies Warfield and R. Lancaster Williams, receivers appointed by the United States Circuit Court for the said Southern District of Georgia in the suit of the Seaboard Air Line Railway against the Continental Trust Company, as trustee, etc.; that said corporation and said receivers were engaged in the transportation of property in interstate commerce as common carriers wholly by railroad over the said railway from Savannah, as aforesaid, to Jacksonville, as aforesaid; that the said corporation common carriers and said receivers, throughout the period of time aforesaid, were also engaged in the trans-

15 portation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers and said receivers for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah,

in the State of Georgia, aforesaid, from Philadelphia aforesaid to Jacksonville aforesaid; that so the said corporation common carriers and said receivers, during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway, and the said S. Davies Warfield and R. Lancaster Williams, receivers as aforesaid, were common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present; that before and during the periods of time aforesaid, schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of said corporation common carriers and said receivers, and showing among other things the joint rate and the only lawful rate which the said common carriers had established, and which was in force throughout the said periods over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route, and in interstate commerce as aforesaid, to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier
16 as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Seaboard Air Line Railway, and said receivers of said Seaboard Air Line Railway, common carriers as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said periods had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said periods.

That during the said periods Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said periods and at the several times of the committing by them of the several offenses in this indictment

hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller, of the said firm of L. F. Miller & Sons.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the period of time aforesaid, to wit, on the thirteenth day of May, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to the said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Sea-
17 board Air Line Railway, whereby such property, to wit, wheat in sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Seaboard Air Line Railway, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadalphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a certain shipment of wheat in sacks, to wit, forty thousand pounds, that being a carload lot, under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by the said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly and wilfully did solicit, accept and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia, Pennsylavnia, to Jacksonville, Florida, as aforesaid, by said common carriers aforesaid for
18 and on behalf of the said L. F. Miller & Sons at a less rate

than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Fifth count.

That before and on the first day of November, in the year of our Lord one thousand nine hundred and seven and throughout the period of time from that day until and on the seventh day of January, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia; and the Atlantic Coast Line Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Virginia and was a common carrier engaged in the transportation of property wholly by railroad over its railway route from a point on its route, to wit, Savannah, in the State and said Southern District of Georgia, to another point on its route, to wit, Jacksonville, in the State of Florida; that the said corporation common carriers throughout the period of time aforesaid were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers, for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah, in the State of Georgia aforesaid, from Philadelphia, to Jacksonville
19 aforesaid; that so the said common carriers during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid, to Jacksonville aforesaid, over their said connecting routes, and that so the said Merchants & Miners' Transportation Company and the said Atlantic Coast Line Railroad Company during the same period, were corporation common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act;

And the grand jurors aforesaid, upon their oaths aforesaid do further present, that before and during the said period, schedules and tariffs (which are too voluminous to be here set forth), as re-

quired by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of the said corporation common carriers, and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over their said through route for the transportation of certain property, to wit, wheat, in sacks, over their said through route and in interstate commerce as aforesaid, from Philadelphia aforesaid to Jacksonville aforesaid, to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners' Transportation Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Atlantic Coast Line Railroad Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said period said common carriers, and each of them, participated in said joint rate; that so the said corporation common carriers during the said period had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said period;

That during the said period Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said period and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller of the said firm of L. F. Miller & Sons:

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that during the period of time aforesaid, to wit, on the twentieth day of December, in the year of our Lord one thousand nine hundred and seven, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Atlantic Coast Line Railroad Company, whereby such property, to wit, wheat in

sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a
21 certain shipment of wheat in sacks, to wit, forty thousand pounds, that being a carload lot under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route and under the common arrangement aforesaid, at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia, Pennsylvania, to Jacksonville, Florida, as aforesaid, by said common carriers aforesaid for and on behalf of the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided and against the peace and dignity of the said United States.

And the grand jurors aforesaid upon their oaths aforesaid, do further present;

Sixth count.

That before and on the first day of November, in the year of our Lord one thousand nine hundred and seven, and throughout the period of time from that day until and on the seventh day of January, in the year of our Lord one thousand nine hundred and
22 eight, the Merchants & Miners Transportation Company was

a corporation organized and existing under and by virtue of the laws of the State of Maryland, and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia and in said Southern District of Georgia; and the Atlantic Coast Line Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Virginia, and was a common carrier engaged in the transportation of property wholly by railroad over its railway route from a point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia, to another point on its route, to wit, Jacksonville, in the State of Florida; that the said corporation, common carriers throughout the period of time aforesaid, were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers, for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah, in the State of Georgia, aforesaid, from Philadelphia aforesaid, to Jacksonville aforesaid; that so the said common carriers during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid, to Jacksonville aforesaid, over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company during the same period, were corporation common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that before and during the said period, schedule and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers,
23 specifying the names of the said corporation common carriers, and showing among other things the joint rate and the only lawful rate which the said corporation carriers had established, and which was in force throughout the said period over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route, and in interstate commerce as aforesaid, from Philadelphia aforesaid to Jacksonville aforesaid, to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier as aforesaid, filed and kept on file with the

said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Atlantic Coast Line Railroad Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said period, said common carriers, and each of them, participated in said joint rate; that so the said corporation common carriers during the said period had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid, to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said period;

That during the said period Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said period and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller of the said firm of L. F. Miller & Sons;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the period of time aforesaid, to wit, on the twentieth day of December, in the year of our Lord one
24 thousand nine hundred and seven, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Atlantic Coast Line Railroad Company, whereby such property, to wit, wheat in sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville, aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a certain shipment of wheat in sacks, to wit, forty thousand pounds, that being a carload lot, under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of

the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid, well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid, over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F.
25 Miller unlawfully, knowingly and wilfully did solicit, accept and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia, Pennsylvania, to Jacksonville, Florida, as aforesaid, by said common carriers aforesaid for and on behalf of the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

Seventh count.

That before and on the first day of November, in the year of our Lord one thousand nine hundred and seven, and throughout the period of time from that day until and on the seventh day of January, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia and in said Southern District of Georgia; and the Atlantic Coast Line Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Virginia and was a common carrier engaged in the transportation of property wholly by railroad over its railway route from a point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia, to another point on its route, to wit, Jacksonville, in the State of Florida; that the said corporation common carriers throughout the period of
26 time aforesaid were also engaged in the transportation of property partly by water and partly by rail over their said routes

from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers, for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah, in the State of Georgia, aforesaid, from Philadelphia aforesaid to Jacksonville aforesaid; that so the said common carriers during the said period had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company during the same period were corporation common carriers subject to the provisions of the act of Congress approved February 4, 1887, entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that before and during the said period, schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of said corporation common carriers and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route and in interstate commerce as aforesaid from Philadelphia aforesaid to Jacksonville aforesaid to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carriers aforesaid, filed and kept on file with the said commission
27 evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Atlantic Coast Line Railroad Company, common carrier as foresaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said period said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said period had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said period;

That during the said period Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of

L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said period and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller of the said firm of L. F. Miller & Sons;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the period of time aforesaid, to wit, on the twenty-seventh day of December, in the year of our Lord one thousand nine hundred and seven, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Atlantic Coast Line Railroad Company, whereby such property, to wit, wheat in sacks, was transported at a less rate than that
28 named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, a certain shipment of wheat in sacks, to wit, forty thousand pounds, that being a carload lot, under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid, well knew that the said property should have been transported through the said District in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in said printed schedules and established by said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then

and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, as aforesaid, by said common carriers aforesaid for and on behalf of the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

29

ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*

A true bill.
December 2nd, 1910.

JOHN F. PRICE,
*Foreman Grand Jury.*

(Endorsement:) No. 377. United States Circuit Court, Eastern Division, Southern District of Georgia. The United States vs. Harvie C. Miller and Morris F. Miller. Indictment for violation interstate commerce act. Filed December 2, 1910. T. F. Johnson, clerk. Alexander Akerman, assistant U. S. attorney.

30

*Demurrer of defendants.*

In the Circuit Court of the United States, Eastern Division, Southern District of Georgia.

UNITED STATES
*vs.*
HARVEY C. MILLER AND MORRIS F. MILLER. } 377.

The defendants now come and, subject to their pleas in abatement of record in said case and without waiving the same, but insisting on the sufficiency thereof, demur to the indictment in the above-named case and to each count thereof, and for cause of demurrer say:

1st. It does not allege in any of the counts thereof what person or corporation filed the schedules and tariffs alleged to have been filed and kept on file with the Interstate Commerce Commission of the United States.

2nd. It does not in any of the counts thereof set out the schedules alleged to have been filed and kept on file with the Interstate Commerce Commision of the United States either in terms or in substance, nor does it set out that portion thereof which shows a rate of 15¢. per 100 pounds for wheat in sacks in carload lots of not less than 24,000 pounds alleged to have been in force.

3rd. It does not in any of the counts thereof allege that the tariffs and schedules in question were posted in conformity with the acts of Congress.

4th. It does not state in any of the counts how or in what manner the alleged schedules and tariffs were published or that they were published in the manner specified and prescribed by the act of Congress.

5th. The indictment does not in any of the counts thereof identify the officer or agent of the corporation carriers, or either of them, who filed the alleged concurrences to the schedules and tariffs alleged to have been filed, nor does it show that such concurrences were filed by any person having authority to file the same.

31 6th. It does not in either of the counts thereof describe the property alleged to have been transported with sufficient definiteness or certainty. The description, to wit, "one car load lot of wheat in sacks (of a given number of pounds)," is too vague and uncertain to identify the transaction.

7th. Jurisdiction in the above mentioned court, to wit, the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, is not set forth in the averments of the indictment or in either of the counts thereof.

8th. Because it is not averred in the said indictment or in any of its counts with the definiteness and particularly required by law that the alleged offense was committed within the jurisdiction of this court; that is to say, in the Eastern Division of the Southern District of Georgia.

9th. Because each count of said indictment is vague, indefinite, and uncertain in this: It is alleged that what was done was done for and on account of and in pursuance of the request L. F. Miller & Sons, and it nowhere appears how and in what way this was done for or on account of the said L. F. Miller & Sons, or how or in what manner the said L. F. Miller & Sons were benefited.

10th. Because the act of Congress approved June 29th, 1906, under which the prosecution is brought contravenes the fifth amendment to the Constitution of the United States in that it unlawfully restricts the liberty of defendants to contract in reference to the carriage of merchandise in interstate commerce between two ports having water communication, said statute permitting defendants full freedom to contract if the carriage is all by water or by a water carrier not under a common arrangement with a rail carrier of freight of the same nature between the same point for a carriage partly by rail and partly by water or by a carrier under a common arrangement and control with a rail carrier, thus making it unlawful for defendants to make a lawful contract—that is, a contract for the carriage of merchandise between two points connected by water and thereby making

32 an illegal, arbitrary, unjust, oppressive classification and an illegal restriction of defendants' right to contract to do a lawful thing.

11th. Because the act of Congress approved June 29th, 1906, under which the prosecution is brought contravenes the fifth amendment of the Constitution of the United States in this, to wit: It deprives defendants of their liberty and property without due process of law. It permits a special contract with a carrier wholly by water. It prohibits a special contract with a carrier by water which voluntarily places itself under said act. It gives the carrier an option and discretion to make a contract of defendants lawful or unlawful in its discretion. It gives the carrier the option and discretion to make a contract for the carriage of goods between Philadelphia, Pa., and Jacksonville, Fla., lawful, and at the same time gives the carrier the option to make the same transaction unlawful; in all of which it contravenes said fifth amendment to the Constitution, as well as the first section of the Constitution of the United States, which grants to Congress the exclusive power to make laws.

12th. Because that portion of the act of Congress approved June 29th, 1906, under which defendants are prosecuted, and which makes corporations criminally liable for the acts of receivers appointed by the court, is repugnant to section 2 of article three of the United States Constitution, which vests the powers of a court of equity in the judiciary, and to the fifth amendment of the Constitution of the United States, which prohibits the depriving of liberty or property without due process of law.

13th. Because the first four counts of said indictment are uncertain, indefinite, and contradictory in their terms in this, to wit: It alleges in each of said counts that the railroad of the Seaboard Air Line Railway was, during all the times named in the indictment, being operated by receivers therein described, and alleged to have been appointed by this court, and yet charges that the transportation for

33 which defendants are indicted was procured from and performed by the Seaboard Air Line Railway, and that the concession for which they are prosecuted under said acts was made by the Seaboard Air Line Railway, said allegations being repugnant and contradictory to each other.

14th. Because the indictment in each of the first four counts thereof avers that the line of railroad of the Seaboard Air Line Railway from Savannah to Jacksonville, Fla., was being operated by the described receivers for said corporation the Seaboard Air Line Railway, it being nowhere shown how or in what manner said receivers were authorized to operate said railroad for said Seaboard Air Line Railway, or how or in what manner they obtained possession of said property for the use of said corporation, instead of for the court which appointed them as receivers.

15th. Said indictment does not in any of its counts state any facts which constitute an offense by this defendant under the laws of the United States.

16th. Because no count of the said indictment charges with sufficient definiteness any offense whatever.

17th. Because it does not allege in any count thereof that the defendants, Harvie C. Miller and Morris F. Miller, were the shippers of the grain alleged to have been transported, but does show that the same was shipped by the copartnership of L. F. Miller & Sons, composed as described, which copartnership is not indicted.

18th. Because each and every count in said indictment alleges that the said alleged concessions were received by the copartnership of L. F. Miller & Sons, composed as described, and does not allege that said concessions were received by the defendants or either of them.

19th. Because no crime is charged in any of the counts of said indictment to have been committed by the defendants Harvie C. Miller, or Morris F. Miller, or either of them.

Whereupon defendants pray that the said indictment be dismissed; that they be discharged without cost; and that they have the
34 judgment of the court whether they shall further plead or answer.

M. H. Todd,
Osborn & Lawrence,
*Defendants' attorneys.*

(Endorsement:) In the Circuit Court of the United States, Eastern Division, Southern District of Georgia. United States vs. Harvey C. Miller and Morris F. Miller. Demurrer to indictment No. 377. Filed March 22, 1911. W. H. Godwin, deputy clerk. Osborne & Lawrence, attorneys for defendant.

35 *Opinion of court on demurrer.*

United States vs. Harvey C. Miller et al.

OPINION OF THE COURT.

Speer, Judge (orally):

This question must be determined in view of certain fundamental principles for the construction of statutes. It is a criminal statute, and of course must be strictly construed. It may be said that it is a statute in derogation of common law, although in a sense remedial in its character. Before its enactment, however, both the shipper and the carrier had the right to pay or charge such freight charges as they might agree upon. For this reason, also, I think that those provisions of the law to which the penal provisions have been attached must be strictly construed; that is to say, when an indictment is framed with the view of imposing a penalty upon a carrier or a shipper, it must set forth with sufficient fullness every essential feature of the law for the violation of which the accused is charged.

This defendant, as I understand it, speaking generally, is indicted for accepting or securing a less rate than that which has been established and published as required by law. Now how does Congress

provide that such rates shall be established and published as required by law?

On page 895, Supplement (1907) to Compiled Statutes of the United States, published by the West Publishing Company, we find this language, which is taken from the act of Congress on the subject:

"Every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and points on the route of any other carrier by railroad . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force . . . and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

36 So important is this law that a failure to comply with it is itself made the subject of an indictment. It is intended to give information to shippers, so that no individual may violate the general provisions of the interstate commerce law at the initial point of shipment. It is intended to bring the law home to the people, a knowledge of the law, and of the rates, and that is one, and perhaps the most essential, of the forms of publication as required by the statute. The schedules of such rates must not only be published, but filed under the instructions of the commission and for its remedial action—a most important remedial action under the present condition of the law, because it can suspend these tariffs when it finds that they are unjust, arbitrary, or discriminatory and protect the people in that way. They must be published not only to protect the people against the railroads, but the railroads against themselves and the shipper. If it had been alleged in the indictment that these rates had been published, as required by law—I understand it is conceded that it is not so alleged—I think the indictment would have been sufficient. The language of the law being that such schedules shall be plainly printed in large type and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation in such form that they shall be accessible to the public and can be conveniently inspected. But the indictment does not, in my judgment, conform to the statute. The language used is:

"That before and during the period of time aforesaid schedules and tariffs (which are too voluminous to be here set forth), as required

by law, were filed and kept on file with the Interstate Commerce Commissioner of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of said corporation common carriers."

Now this does not appear to be a compliance with the statute,
37 which not only requires large and conspicuous type, but also that for the use of the public copies shall be kept posted in two public and conspicuous places in the depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation. It is expressly declared that this shall be done in such form that these rates shall be accessible to the public. It is further declared that this is done in order that the schedules shall be conveniently inspected. The provisions of this section of the law are to apply to all traffic, transportation, and facilities defined in this act.

Now, how valuable is this provision if the shipper whose home is remote from the files of the Interstate Commerce Commission? How valuable to the plain or humble man to whom at times, perhaps, the station agent may not impart the information as to the legal rate as ungrudgingly and cheerfully as he ought to do? If the law as to posting is complied with, the shipper does not need to inquire elsewhere.

This court has little regard for unessential technicalities, but this provision for the posting the rates of interstate transportation near the homes of the people is regarded as of inestimable value to the shipping public. It is frankly confessed in the argument that in point of fact it would be impossible to prove that such posting was done, and it was therefore not alleged.

Now, the defendants are shippers. It is insisted that they knew all about the rates. This may be true, but the law is made for all. One principle of law is that they are presumed to be innocent until the contrary is made to appear by proof. This can only be done by due process of law. No matter how guilty they may be, they cannot be held to answer save on indictment or presentment of a grand jury. They are held on such an indictment, but since it is not alleged, is not true, and therefore cannot be alleged in such indictment, that the law which was enacted to charge them with notice has been
38 complied with, that is to say, that the rates from which they departed were not posted and published as required by law, the court, in its construction of the law, must hold the indictment insufficient for the absence of compliance with the statute. Requiring the posting of rates is an important method of publication, and therefore notice to the public. Innumerable cases under the opposite contention might be brought against the uninformed, or partially informed, who otherwise would not have violated the law at all.

The other grounds of the demurrer are not regarded as sufficient. I reach this conclusion with less hesitation because of the wise and recent provision of our criminal procedure which accords to the

Government the right of exception and review by the Supreme Court upon rulings of the trial courts involving the construction of a law.

(Endorsement:) Circuit Court of the United States, Eastern Division, Southern District of Georgia. United States vs. Harvey C. Miller et al. Opinion of the court sustaining demurrer. Filed April 19, 1911. T. F. Johnson, clerk.

39 *Order sustaining demurrer and quashing indictment.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

THE UNITED STATES OF AMERICA
*vs.*
HARVEY C. MILLER & MORRIS F. MILLER. } Indictment No. 377. Vio. act to regulate commerce, as amended.

The court being of the opinion that each count of the indictment is defective, in that it does not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law, the demurrer is sustained upon that ground. Each and every other ground of the demurrer is overruled. The indictment and each count thereof is, therefore, quashed and the defendants are hereby discharged.

In open court this March 23rd, A. D. 1911.

CC/512.

EMORY SPEER,
*United States Judge.*

(Indorsement:) Circuit Court of U. S., Eastern Division, No. 377, Southern District, Georgia. United States of America vs. Harvey C. Miller & Morris F. Miller. Order sustaining demurrer & quashing indictment. Filed March 23, 1911. S. F. B. Gillespie, deputy clerk.

40 *Stipulation of counsel as to record.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

THE UNITED STATES OF AMERICA
*vs.*
HARVIE C. MILLER AND MORRIS F. MILLER. } Indictment for violation of interstate commerce acts. Indictment No. 377.

It is hereby stipulated by and between counsel for the United States of America, and counsel for the above named Harvie C. Miller and Morris F. Miller, that the following parts of the record only are material to the writ of error heretofore sued out in the above entitled cause by the said United States of America, and that the clerk may

incorporate only such parts of the record in the transcript for the Supreme Court, to wit:

1. The indictment.
2. The demurrer to the indictment.
3. The opinion of the court sustaining the demurrer.
4. The judgment of the court sustaining the demurrer.
5. The bill of exceptions.

This 26 day of April, 1911.

ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*
M. H. TODD,
OSBORN & LAWRENCE,
*Attorneys for Harvie C. Miller and Morris F. Miller.*

41 *Assignment of error.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| UNITED STATES OF AMERICA<br>*vs.*<br>HARVEY C. MILLER AND MORRIS F. MILLER. | Indictment No. 377. Indictment for violation of interstate commerce act. |

ASSIGNMENTS OF ERROR.

The United States of America, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of the cause, to wit:

First. The court erred in sustaining the demurrer of the defendants to the indictment of the grand jury of the United States, and in quashing said indictment.

Second. The court erred in holding and deciding that under the act to regulate commerce approved February 4, 1887, as amended, and particularly as amended by the act of Congress approved June 29, 1906, that in an indictment charging a shipper with unlawfully, knowingly, and wilfully soliciting, accepting, and receiving a concession in respect to the transportation of property in interstate commerce, that it was necessary to allege that the tariff of the common carrier over whose route the shipment moved had been posted by said carrier in conformity with section six of said act as amended, although in said indictment it was alleged that the aforesaid tariffs had been filed, and kept on file with the Interstate Commerce Commission of the United States, and were printed and kept open to public inspection, and that said fact was well known to said shipper.

Third. The court erred in entering judgment in favor of the defendants, sustaining the demurrer of the defendants, and quashing said indictment.

42 Wherefore the United States of America prays that the judgment of said Circuit Court of the United States for the Eastern Division of the Southern District of Georgia be, under the act of Congress approved March 2, 1907, reviewed by the Supreme Court of the United States, and said judgment be reversed.

ALEXANDER AKERMAN,
*Assistant United States Attorney.*

(Indorsement:) No. 377. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Assignments of error. Filed April 19th, 1911. T. F. Johnson, clerk. Alexander Akerman, assistant U. S. attorney.

43 *Bill of exceptions.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| THE UNITED STATES OF AMERICA *vs.* HARVIE C. MILLER & MORRIS F. MILLER. | Indictment No. 377. Vio. act to regulate commerece as amended. |

Be it remembered that in the above stated cause, in this the United States Circuit Court in and for the Eastern Division of the Southern District of Georgia, at the November term, 1910, of said court, the honorable Emory Speer, judge, presiding, the above stated cause was, on the 21st day of March, A. D. 1911, called, and defendants filed a demurrer to the said indictment consisting of eighteen grounds. The said demurrer was argued by counsel, and afterwards, to wit, on the 22nd day of March, A. D. 1911, the said judge rendered a decision sustaining the third and fourth grounds of the said demurrer, and quashing the said indictment; and then and there the United States of America, by Alexander Akerman, Esquire, assistant United States attorney, excepted to the judgment of the court sustaining the said third and fourth grounds of said demurrer, and had the exceptions noted.

And now, in furtherance of justice and that right may be done, the United States of America, by Alexander Akerman, Esquire, assistant United States attorney, tenders and presents this bill of exceptions in the case to the action of the court, and states that the said judgment of the court sustaining the third and fourth grounds of said demurrer is contrary to law, and that said demurrer should have been overruled in its entirety. And the said United States of America, by Alexander Akerman, assistant United States attorney, prays that the same may be settled and allowed and signed and sealed

by the court and made a part of the record, and the same is accordingly done.

44 This 24th day of March, A. D. 1911.

EMORY SPEER,
*United States Judge.*

CC/514.

(Indorsement:) No. 377. Circuit Court of the U. S., Eastern Division, Southern District, Georgia. The United States of America vs. Harvie C. Miller and Morris F. Miller. Order allowing bill of exceptions by U. S. Filed March 24, 1911. T. F. Johnson, clerk. Alexander Akerman, asst. U. S. attorney.

45 *Petition for writ of error, No. 377.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| UNITED STATES OF AMERICA<br>*vs.*<br>HARVEY C. MILLER AND MORRIS F. MILLER. | Indictment No. 377. Indictment for violation of interstate commerce act. |

PETITION FOR WRIT OF ERROR.

And now comes the United States of America, by Alexander Akerman, assistant United States attorney for the Southern District of Georgia, and says:

That on the 23rd day of March, A. D. 1911, the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia entered a judgment herein in favor of the defendants and against the United States of America, in which judgment, and the proceedings had prior thereto in this cause, certain errors were committed, to the prejudice of the United States of America, all of which will more in detail appear from the assignments of errors which are filed with this petition.

Wherefore the United States of America prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ALEXANDER AKERMAN,
*Assistant United States Atty.*

And now, to wit, on this 18th day of April, A. D. 1911, it is ordered that the writ of error be allowed as prayed for.

EMORY SPEER,
*U. S. District Judge for Southern District of Georgia, Presiding in said Circuit Court.*

CC/523.

46 (Indorsement:) No. 377. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Petition for writ of error and order allowing same. Filed April 19th, 1911. T. F. Johnson, clerk. CC/523. Alexander Akerman, assistant U. S. attorney.

47 *Writ of error, No. 377.*

UNITED STATES OF AMERICA, *ss:*

*The President of the United States of America to the Judges of the Circuit Court of the United States in and for the Eastern Division of the Southern District of Georgia, greeting:*

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit before you, between the United States of America, plaintiff, and Harvey C. Miller and Morris F. Miller, defendants, a manifest error hath happened to the great damage of the said plaintiff, the United States of America, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done between the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington on the 17th day of May, next, in said Supreme Court of the United States to be there and then held, that the record and proceedings aforesaid be inspected, and the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 18th day of April, in the year of our Lord one thousand nine hundred and eleven, and of the Independence of the United States the one hundred and thirty-fifth.

T. F. JOHNSON,
*Clerk of the Circuit Court of the United States of America for the Southern District of Georgia.*

The above writ of error is hereby allowed. This 18th day of April, 1911.

EMORY SPEER,
*United States District Judge, Presiding in said Circuit Court.*

CC/523.

Due and legal service of the foregoing writ of error acknowledged and all other and further service waived.

OSBORN & LAWRENCE,
*Attorneys for Harvey C. & Morris F. Miller,*
*Defendants in Error.*

48 (Indorsement:) No. 377. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Writ of error. Filed April 19th, 1911. T. F. Johnson, clerk. Alexander Akerman, assistant U. S. attorney.

49 *Citation, No. 377.*

UNITED STATES OF AMERICA, *ss:*

*To Harvey C. Miller and Morris F. Miller:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States to be held at the city of Washington, on the 17th day of May, A. D. 1911, pursuant to a writ of error on file in the clerk's office of the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, in that certain action wherein the United States of America is plaintiff in error, and you, the said Harvey C. Miller and Morris F. Miller, are defendants in error, to show cause, if any there be, why the judgment given, made, and rendered against the said United States of America, in said writ of error mentioned, should not be corrected and speedy justice done to the parties in that behalf.

This 18th day of April, A. D. 1911.

EMORY SPEER,
*United States District Judge presiding*
*in said Circuit Court.*

CC/524.

Due and legal service of the foregoing citation acknowledged. All other and further service is hereby waived. April 18th, 1911.

OSBORN & LAWRENCE,
*Attorneys for Harvey C. and Morris F. Miller,*
*Defendants in Error.*

(Indorsement:) No. 377. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Citation on writ of error. Filed April 19th, 1911. T. F. Johnson, clerk. CC/524. Alexander Akerman, assistant U. S. attorney.

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*Clerk's certificate.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

The United States of America, versus Harvie C. Miller and Morris F. Miller.

WRIT OF ERROR TO THE SUPREME COURT OF THE UNITED STATES.

I, T. F. Johnson, clerk of the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, do hereby certify that the foregoing 49 pages comprise a true, complete and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings in the case of the United States of America versus Harvie C. Miller and Morris F. Miller, No. 377, tried and determined in said Circuit Court at the last November term thereof in which said indictment No. 377 was quashed on the 23rd day of March, 1911.

In witness whereof, I have hereunto set my hand and affixed the seal of said court at Savannah, Georgia, this 9th day of May, A. D. 1911.

[SEAL.]

T. F. JOHNSON, *Clerk.*

(Indorsement on cover:) File No. 22683. S. Georgia. C. C. U. S. Term No. 1062. The United States, plaintiff in error, vs. Harvey C. Miller and Morris F. Miller. Filed May 18th, 1911. File No. 22683.

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# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, 1910.

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## No. 1063.

### THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

### HARVEY C. MILLER AND MORRIS F. MILLER.

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IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

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INDEX.

1 United States Circuit Court. Special Term, November, 1910.

UNITED STATES OF AMERICA,
*Southern District of Georgia, Eastern Division.*

The grand jurors of the United States, selected, chosen, and sworn in and for the Eastern Division of the Southern District of Georgia, upon their oaths present:

*First count.*

That before and on the first day of November, in the year of our Lord one thousand nine hundred and seven, and throughout the period of time from that day until and on the fifteenth day of January, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit: Philadelphia, in the State of Pennsylvania, to another point on its route, to wit: Savannah, in the State of Georgia, and in said Southern District of Georgia; and the Atlantic Coast Line Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Virginia and was a common carrier engaged in the transportation of property wholly by railroad over its railway route from a point on its route, to wit: Savannah, in the State of Georgia, and in said Southern District of Georgia, to another point on its route, to wit: Jacksonville, in the State of Florida; that said corporation common carriers throughout the period of time aforesaid were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers, for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah,

2 in the State of Georgia, aforesaid, from Philadelphia, aforesaid, to Jacksonville, aforesaid: that so the said common carriers during the said period, had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid, to Jacksonville aforesaid, over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company during the same period, were corporation common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to Regulate Commerce," and also of the acts of Congress amendatory of said act;

And the grand jurors aforesaid upon their oaths aforesaid, do further present; that before and during the said period, schedules and tariffs (which are too voluminous to be here set forth), as re-

quired by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of the said corporation common carriers and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over their said through route for the transportation of certain property, to wit: Wheat in sacks over their said through route and in interstate commerce as aforesaid from Philadelphia aforesaid to Jacksonville aforesaid to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier as aforesaid, filed and kept on file with the said Commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Atlantic Coast Line Railroad Company, common carrier as aforesaid, filed and kept on file with the said Commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before
3 and during said period, said common carriers and each of them participated in said joint rate; that so the said common carriers during the said period had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said period;

That during the said period Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said period and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller of the said firm of L. F. Miller & Sons;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the period of time aforesaid, to wit, on the third day of January, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat, in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Atlantic Coast Line Railroad Company, whereby such property, to wit, wheat, in sacks, was transported at a less rate than that named in the tariffs

published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Mor-
4 ris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, to wit, a certain shipment of wheat, in sacks, to wit, forty thousand pounds, that being a carload lot, under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid, well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid, over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in the said printed schedules and established by said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, as aforesaid, by said common carriers aforesaid for and on behalf of the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof,
5 contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

*Second count.*

That before and on the first day of November, in the year of our Lord one thousand nine hundred and seven, and throughout the period of time from that day until and on the fifteenth day of January, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation

organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the State of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia; and the Atlantic Coast Line Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Virginia and was a common carrier engaged in the transportation of property wholly by railroad over its railway route from a point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia, to another point on its route, to wit, Jacksonville, in the State of Florida; that the said corporation common carriers throughout the said period of time were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation common carriers, for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah, in the State of Georgia aforesaid, from Philadelphia aforesaid, to Jacksonville aforesaid; that so the said common carriers during the said period had an established through route for
6 the transportation of property in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company during the same period were corporation common carriers subject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present that before and during the said period schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of the said corporation common carriers and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route and in interstate commerce as aforesaid from Philadelphia aforesaid to Jacksonville aforesaid to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in

the manner required by law; that before and during the said period the said Atlantic Coast Line Railroad Company, common carrier as aforesaid, filed and kept on file with the said commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during said period said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said period had estab-
7 lished a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers or either of them during the said period.

That during the said period Levi F. Miller, John E. Miller, Harvie C. Miller, and Morris F. Miller were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all of the foregoing facts during the said period and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller, of the said firm of L. F. Miller & Sons.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the said period of time aforesaid, to wit, on the seventh day of January, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and willfully solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers, subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Atlantic Coast Line Railroad Company, whereby such property, to wit, wheat in sacks, was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and willfully cause and procure the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company, common carriers as aforesaid, to transport in interstate commerce through the said Southern
8 District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route, at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, to wit, a certain shipment of wheat in sacks, to wit, thirty thousand pounds, that being a carload lot, under the common arrangement aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons,

at the time of the conducting of said property through the said district in interstate commerce aforesaid, very well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid, over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in the said printed schedules and established by said common carriers as aforesaid.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and willfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, as aforesaid, by said common carriers aforesaid for and on behalf of the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

And the grand jurors aforesaid, upon their oaths aforesaid, do further present:

9 *Third count.*

That before and on the first day of November, in the year of our Lord one thousand nine hundred and seven, and throughout the period of time from that day until and on the fifteenth day of January, in the year of our Lord one thousand nine hundred and eight, the Merchants & Miners Transportation Company was a corporation organized and existing under and by virtue of the laws of the State of Maryland and was a common carrier engaged in the transportation of property wholly by water over its route from a point on its route, to wit, Philadelphia, in the Sate of Pennsylvania, to another point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia; and the Atlantic Coast Line Railroad Company was a corporation organized and existing under and by virtue of the laws of the State of Virginia and was a common carrier engaged in the transportation of property wholly by railroad over its railway route from a point on its route, to wit, Savannah, in the State of Georgia, and in said Southern District of Georgia, to another point on its route, to wit, Jacksonville, in the State of Florida; that the said corporation common carriers throughout the said period of time were also engaged in the transportation of property partly by water and partly by rail over their said routes from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville

aforesaid, in the State of Florida, into and through the said Southern District of Georgia, under a common arrangement between the said corporation, common carriers, for a continuous carriage and shipment of property in interstate commerce over their said routes, connecting at Savannah, in the State of Georgia, aforesaid, from Philadelphia aforesaid, to Jacksonville aforesaid; that so the said common carriers during the said period had an established through route for the transportation of property in interstate commerce from Philadelphia aforesaid, to Jacksonville aforesaid, over their said connecting routes; and that so the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company during the same period, were corporation common carriers sub-
10 ject to the provisions of the act of Congress approved February 4, 1887, and entitled an "Act to regulate commerce," and also of the acts of Congress amendatory of said act;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that before and during the said period, schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commission of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of the said corporation common carriers and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over their said through route for the transportation of certain property, to wit, wheat in sacks over their said through route and in interstate commerce as aforesaid from Philadelphia aforesaid to Jacksonville aforesaid to be fifteen cents for each one hundred pounds thereof in carload lots of not less than twenty-four thousand pounds each; that before and during the said period the Merchants & Miners Transportation Company, common carrier as aforesaid, filed and kept on file with the said Commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period the said Atlanta Coast Line Railroad Company, common carrier as aforesaid, filed and kept on file with the said Commission evidence of its concurrence in and acceptance of said joint rate in the manner required by law; that before and during the said period said common carriers, and each of them, participated in said joint rate; that so the said common carriers during the said period had established a through route and joint rate for the transportation of wheat in sacks in interstate commerce from Philadelphia aforesaid, to Jacksonville aforesaid, and that the said joint rate was not in any manner changed by the said common carriers, or either of them, during the said period;

That during the said period Levi F. Miller, John E. Miller,
11 Harvie C. Miller, and Morris F. Miller, were grain merchants doing business at Philadelphia, Pennsylvania, as copartners, under the firm name of L. F. Miller & Sons; and, furthermore, that all

of the foregoing facts during the said period and at the several times of the committing by them of the several offenses in this indictment hereafter mentioned were well known to said Harvie C. Miller and said Morris F. Miller of the said firm of L. F. Miller & Sons;

And the grand jurors aforesaid, upon their oaths aforesaid, do further present, that during the said period of time aforesaid, to wit, on the tenth day of January, in the year of our Lord one thousand nine hundred and eight, and while the said schedules and tariffs so filed as aforesaid were still in force upon said through route, one Harvie C. Miller and one Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, unlawfully did, knowingly and wilfully, solicit, accept and receive a concession in respect to the transportation of property in interstate commerce, to wit, wheat in sacks, from common carriers subject to said act of Congress to regulate commerce and the acts of Congress amendatory thereof, to wit, the Merchants & Miners Transportation Company and the Atlantic Coast Line Railroad Company, whereby such property, to wit, wheat in sacks was transported at a less rate than that named in the tariffs published and filed by such common carriers as aforesaid as is required by said act to regulate commerce and the acts amendatory thereof, in this, to wit, that the said Harvie C. Miller and Morris F. Miller, acting for and on behalf of the said L. F. Miller & Sons, did unlawfully, knowingly, and wilfully cause and procure the said Merchants & Miners Transportation Company and the said Atlantic Coast Line Railroad Company, common carriers as aforesaid, to transport in interstate commerce through the said Southern District of Georgia, to wit, from Philadelphia aforesaid to Jacksonville aforesaid over the said through route at a rate and a charge for such transportation thereof of ten cents for each one hundred pounds, to wit, a certain shipment of wheat in sacks, to wit, thirty thousand pounds, that being a carload lot, under the common arrange-
12 ment aforesaid, when as the said Harvie C. Miller and the said Morris F. Miller, of the firm of L. F. Miller & Sons, at the time of the conducting of said property through the said district in interstate commerce aforesaid, well knew that the said property should have been transported through the said district in interstate commerce aforesaid, to wit, from Philadelphia aforesaid to Jacksonville aforesaid, over the said through route and under the common arrangement aforesaid at a rate and charge of fifteen cents for each one hundred pounds thereof, that being the rate and charge so shown in the said printed schedules and established by said common carriers as aforesaid;

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said Harvie C. Miller and the said Morris F. Miller unlawfully, knowingly, and wilfully did solicit, accept, and receive a concession in respect to the transportation of property in interstate commerce as aforesaid by the common carriers as aforesaid subject to the acts of Congress aforesaid, which said property was then and

there transported and conducted through the said Southern District of Georgia, to wit, from Philadelphia aforesaid, in the State of Pennsylvania, to Jacksonville aforesaid, in the State of Florida, as aforesaid, by said common carriers for and on behalf of the said L. F. Miller & Sons at a less rate than that named in the tariffs published and filed by said common carriers as is required by said act to regulate commerce and the acts amendatory thereof, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the said United States.

ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*

A true bill.
December 2nd, 1910.

JOHN F. PRICE,
*Foreman Grand Jury.*

Indictment No. 378. Filed December 2, 1910. T. F. Johnson, clerk.

13 *Demurrer of defendants.*

In the Circuit Court of the United States, Eastern Division, Southern District of Georgia.

UNITED STATES
*vs.*
HARVEY C. MILLER AND MORRIS F. MILLER. } 378.

The defendants now come and subject to their pleas in abatement of record in said case and without waiving the same, but insisting on the sufficiency thereof, demur to the indictment in the above-named case and to each count thereof, and for cause of demurrer say:

1st. It does not allege in any of the counts thereof what person or corporation filed the schedules and tariffs alleged to have been filed and kept on file with the Interstate Commerce Commission of the United States.

2nd. It does not in any of the counts thereof set out the schedules alleged to have been filed and kept on file with the Interstate Commerce Commission of the United States either in terms or in substance, nor does it set out that portion thereof which shows a rate of 15 cents per 100 pounds for wheat in sacks in carload lots of not less than 24,000 pounds alleged to have been in force.

3rd. It does not in any of the counts thereof allege that the tariffs and schedules in question were posted in conformity with the acts of Congress.

4th. It does not state in any of the counts how or in what manner the alleged schedules and tariffs were published or that they were published in the manner specified and prescribed by the act of Congress.

5th. The indictment does not in any of the counts thereof identify the officer or agent of the corporation carriers, or either of them, who filed the alleged concurrences to the schedules and tariffs alleged to have been filed, nor does it show that such concurrences were filed by any person having authority to file the same.

6th. It does not in either of the counts thereof describe
14 the property alleged to have been transported with sufficient definiteness or certainty, the description given, to wit, "one carload lot of wheat in sacks (of a given number of pounds)," is too vague and uncertain to identify the transaction.

7th. Jurisdiction in the above-mentioned court, to wit, the Circuit Court of the United States for the eastern division of the Southern District of Georgia, is not set forth in the averments of the indictment or in either of the counts thereof.

8th. Because it is not averred in the said indictment or in any of its counts with the definiteness and particularity required by law that the alleged offense was committed within the jurisdiction of this court, that is to say, in the eastern division of the Southern District of Georgia.

9th. Because each count of said indictment is vague, indefinite, and uncertain in this: It is alleged that what was done was done for and on account of and in pursuance of the request of L. F. Miller & Sons, and it nowhere appears how and in what way this was done for or on account of the said L. F. Miller & Sons, or how or in what manner the said L. F. Miller & Sons were benefited.

10th. Because the act of Congress approved June 29, 1906, under which the prosecution is brought, contravenes the fifth amendment to the Constitution of the United States, in that it unlawfully restricts the liberty of defendants to contract in reference to the carriage of merchandise in interstate commerce between two ports having water communication, said statute permitting defendants full freedom to contract if the carriage is all by water or by a water carrier not under a common arrangement with a rail carrier, but restricts such liberty to contract for the carriage of freight of the same nature between the same point for a carriage partly by rail and partly by water or by a carrier under a common arrangement and control with a rail carrier, thus making it unlawful for defendants to make a lawful contract, that is, a contract for the carriage of merchandise between
two points connected by water, and thereby making an illegal,
15 arbitrary, unjust, oppressive classification and an illegal restriction of defendants' right to contract to do a lawful thing.

11th. Because the act of Congress approved June 29, 1906, under which the prosecution is brought, contravenes the fifth amendment of the Constitution of the United States in this, to wit: It deprived defendants of their liberty and property without due process of law. It permits a special contract with a carrier wholly by water. It prohibits a special contract with a carrier by water which voluntarily

places itself under said act. It gives the carrier an option and discretion to make a contract of defendants lawful or unlawful in its discretion. It gives the carrier the option and discretion to make a contract for the carriage of goods between Philadelphia, Pa., and Jacksonville, Fla., lawful, and at the same time it gives the carrier the option to make the same transaction unlawful; in all of which it contravenes said fifth amendment to the Constitution, as well as the first section of the Constitution of the United States, which grants to Congress the exclusive power to make laws.

12th. Because that portion of the act of Congress approved June 29, 1906, under which defendants are prosecuted and which makes corporations criminally liable for the acts of receivers appointed by the courts is repugnant to section 2 of article three of the Constitution of the United States, which vests the powers of a court of equity in the judiciary, and to the fifth amendment to the Constitution of the United States, which prohibits the depriving of liberty or property without due process of law.

13th. Said indictment does not in any of its counts state any facts which constitute an offense by this defendant under the laws of the United States.

14th. Because no count of the said indictment charges with sufficient definiteness any offense whatever.

15th. Because it does not allege in any count thereof that the defendants, Harvie C. Miller and Morris F. Miller, were the shippers of the grain alleged to have been transported, but does show
16 that the same was shipped by the copartnership of L. F. Miller & Sons, composed as described, which copartnership is not indicted.

16th. Because each and every count in said indictment alleges that the said alleged concessions were received by the copartnership of L. F. Miller & Sons, composed as described, and does not allege that said concessions were received by the defendants or either of them.

17th. Because no crime is charged in any of the counts of said indictment to have been committed by the defendants, Harvie C. Miller or Morris F. Miller, or either of them.

Whereupon defendants pray that the said indictment be dismissed, that they be discharged without cost, and that they have the judgement of the court whether they shall further plead or answer.

M. H. Todd,
Osborne & Lawrence,
*Defendants' Attorneys.*

(Endorsement:) In the Circuit Court of the United States, eastern division, Southern District of Georgia, United States vs. Harvey C. Miller and Morris F. Miller, demurrer to indictment No. 378. Filed March 22, 1911. W. H. Godwin, deputy clerk, Osborne & Lawrence, attorneys for defendants.

17 *Opinion of the court on demurrer.*

United States vs. Harvey C. Miller et al.

OPINION OF THE COURT.

SPEER, Judge (orally):

This question must be determined in view of certain fundamental principles for the construction of statutes. It is a criminal statute, and of course must be strictly construed. It may be said that it is a statute in derogation of common law, although in a sense remedial in its character. Before its enactment, however, both the shipper and the carrier had the right to pay or charge such freight charges as they might agree upon. For this reason, also, I think that those provisions of the law to which the penal provisions have been attached must be strictly construed; that is to say, when an indictment is framed with the view of imposing a penalty upon a carrier or a shipper it must set forth with sufficient fullness every essential feature of the law for the violation of which the accused is charged.

This defendant, as I understand it, speaking generally, is indicted for accepting or securing a less rate than that which has been established and published as required by law. Now, how does Congress provide that such rates shall be established and published as required by law?

On page 895, Supplement (1907) to Compiled Statutes of the United States, published by the West Publishing Company, we find this language, which is taken from the act of Congress on the subject:

"Every common carrier subject to the provisions of this act shall file with the commission created by this act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and points on the route of any other carrier by railroad . . . The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force . . . and any rules or regulations which in any wise change, affect, or determine any part of the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected."

18 So important is this law that a failure to comply with it is itself made the subject of an indictment. It is intended to give information to shippers, so that no individual may violate the general provisions of the interstate commerce law at the initial point

of shipment. It is intended to bring the law home to the people, a knowledge of the law, and of the rates, and that is one, and perhaps the most essential, of the forms of publication as required by the statute. The schedules of such rates must not only be published but filed under the instructions of the Commission, and for its remedial action—a most important remedial action under the present condition of the law, because it can suspend these tariffs when it finds that they are unjust, arbitrary, or discrim'natory, and protect the people in that way. They must be published not only to protect the people against the railroads but the railroads against themselves and the shipper. If it had been alleged in the indictment that these rates had been published as required by law—I understand it is conceded that it is not so alleged—I think the indictment would have *have* been sufficient. The language of the law being that such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier, where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected. But the indictment does not, in my judgment, conform to the statute. The language used is:

"That before and during the period of time aforesaid, schedules and tariffs (which are too voluminous to be here set forth), as required by law, were filed and kept on file with the Interstate Commerce Commissioner of the United States, and said schedules were printed and kept open to public inspection by said common carriers, specifying the names of said corporation common carriers."

Now this does not appear to be a compliance with the
19 statute, which not only requires large and conspicuous type, but also that for the use of the public copies shall be kept posted in two public and conspicuous places in the depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation. It is expressly declared that this shall be done in such form that these rates shall be accessible to the public. It is further declared that this is done in order that the schedules shall be conveniently inspected. The provisions of this section of the law are to apply to all traffic, transportation, and facilities defined in this act.

Now, how valuable is this provision if the shipper whose home is remote from the files of the Interstate Commerce Commission? How valuable to the plain or humble man to whom at times, perhaps, the station agent may not impart the information as to the legal rate as ungrudgingly and cheerfully as he ought to do? If the law as to posting is complied with, the shipper does not need to inquire elsewhere.

This court has little regard for unessential technicalities, but this provision for the posting the rates of interstate transportation near the homes of the people is regarded as of inestimable value to the shipping public. It is frankly confessed in the argument that in

point of fact it would be impossible to prove that such posting was done, and it was therefore not alleged.

Now, the defendants are shippers. It is insisted that they knew all about the rates. This may be true, but the law is made for all. One principle of law is that they are presumed to be innocent until the contrary is made to appear by proof. This can only be done by due process of law. No matter how guilty they may be, they can not be held to answer save on indictment or presentment of a grand jury. They are held on such an indictment, but since it is not alleged, is not true, and therefore can not be alleged in such indictment, that the law which was enacted to charge them with notice has been complied with—that is to say, that the rates from which they departed were not posted and published as required by law—the court, in its construction of the law, must hold the indictment insufficient for the absence of compliance with the statute. Requiring the posting of rates is an important method of publication, and therefore notice to the public. Innumerable cases under the opposite contention might be brought against the uninformed, or partially informed, who otherwise would not have violated the law at all.

The other grounds of the demurrer are not regarded as sufficient. I reach this conclusion with less hesitation because of the wise and recent provision of our criminal procedure, which accords to the Government the right of exception and review by the Supreme Court upon rulings of the trial courts involving the construction of a law.

*Order sustaining demurrer and quashing indictment.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| THE UNITED STATES OF AMERICA *vs.* HARVEY C. MILLER & MORRIS F. MILLER. | Indictment No. 378. Vio. act to regulate commerce, as amended. |

The court being of the opinion that each count of the indictment is defective, in that it does not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law, the demurrer is sustained upon that ground. Each and every other ground of the demurrer is overruled. The indictment and each count thereof is therefore quashed, and the defendants are hereby discharged.

In open court this March 23rd, A. D. 1911.

EMORY SPEER,
*United States Judge.*

(Indorsement:) Circuit Court of U. S., Eastern Division, 378, Southern Dist. Georgia. United States of America vs. Harvey C. Miller & Morris F. Miller. Order sustaining demurrer and quashing indictment. Filed March 23, 1911. S. F. B. Gillespie, deputy clerk.

22 *Stipulation of counsel as to record.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| UNITED STATES OF AMERICA<br>*vs.*<br>HARVIE C. MILLER AND MORRIS F. MILLER. | Indictment for violation of interstate commerce acts. Indictment No. 378. |

It is hereby stipulated by and between counsel for the United States of America and counsel for the above-named Harvie C. Miller and Morris F. Miller that the following parts of the record only are material to the writ of error heretofore sued out in the above-entitled cause by the said United States of America, and that the clerk may incorporate only such parts of the record in the transcript for the Supreme Court, to wit:

1. The indictment.
2. The demurrer to the indictment.
3. The opinion of the court sustaining the demurrer.
4. The judgment of the court sustaining the demurrer.
5. The bill of exceptions.

This 26th day of April, 1911.

ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*
M. H. TODD,
OSBORN & LAWRENCE,
*Attorneys for Harvie C. Miller and Morris F. Miller.*

23 *Assignment of errors.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| UNITED STATES OF AMERICA<br>*vs.*<br>HARVEY C. MILLER AND MORRIS F. MILLER. | Indictment No. 378. Indictment for violation of interstate commerce act. |

*Assignments of error.*

The United States of America, in connection with its petition for a writ of error, makes the following assignments of error, which it avers occurred upon the trial of the cause, to wit:

*First.*—The court erred in sustaining the demurrer of the defendants to the indictment of the grand jury of the United States and in quashing said indictment.

*Second.*—The court erred in holding and deciding that under the act to regulate commerce, approved February 4, 1887, as amended,

and particularly as amended by the act of Congress approved June 29, 1906, that in an indictment charging a shipper with unlawfully, knowingly, and wilfully soliciting, accepting, and receiving a concession in respect to the transportation of property in interstate commerce, that it was necessary to allege that the tariff of the common carrier over whose route the shipment moved had been posted by said carrier in conformity with section six of said act as amended, although in said indictment it was alleged that the aforesaid tariffs had been filed and kept on file with the Interstate Commerce Commission of the United States, and were printed and kept open to public inspection, and that said fact was well known to said shipper.

*Third.*—The court erred in entering judgment in favor of the defendants, sustaining the demurrer of the defendants, and quashing said indictment.

Wherefore the United States of America prays that the
24 judgment of said Circuit Court of the United States for the Eastern Division of the Southern District of Georgia be, under the act of Congress approved March 2, 1907, reviewed by the Supreme Court of the United States, and said judgment be reversed.

ALEXANDER AKERMAN,
*Assistant United States Attorney.*

(Indorsement:) No. 378. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Assignments of error. Filed April 19, 1911.

T. F. JOHNSON, *Clerk.*
ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*

25 *Bill of exceptions and order.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| THE UNITED STATES OF AMERICA, *vs.* HARVIE C. MILLER & MORRIS F. MILLER. | Indictment No. 378, Vio. act to regulate commerce, as amended. |

Be it remembered that in the above-stated cause, in this the United States Circuit Court, in and for the Eastern Division of the Southern District of Georgia, at the November term, 1910, of said court, the Honorable Emory Speer, judge presiding, the above-stated cause was, on the 21st day of March, A. D. 1911, called, and defendants filed a demurrer to the said indictment, consisting of eighteen grounds. The said demurrer was argued by counsel, and afterwards, to wit, on the 22nd day of March, A. D. 1911, the said judge rendered a decision sustaining the third and fourth grounds of the said

demurrer and quashing the said indictment; and, then and there the United States of America, by Alexander Akerman, Esquire, assistant United States attorney excepted to the judgement of the court sustaining the said third and fourth grounds of said demurrer and had the exceptions noted.

And now, in furtherance of justice, and that right may be done, the United States of America, by Alexander Akerman, Esquire, assistant United States attorney, tenders and presents this bill of exceptions in the case to the action of the court, and states that the said judgement of the court sustaining the third and fourth grounds of said demurrer is contrary to law, and that said demurrer should have been overruled in its entirety. And the said United States of America, by Alexander Akerman, assistant United States attorney, prays that the same may be settled and allowed and signed and sealed by the court and made a part of the record, and the same is accordingly done.

This 24th day of March, A. D. 1911.

EMORY SPEER,
*United States Judge.*

26 (Indorsement:) No. 378. Circuit Court of the U. S., Eastern Division, Southern District Georgia. The United States of America vs. Harvie C. Miller and Morris F. Miller. Order allowing bill of exceptions, by U. S. Filed March 24, 1911.

T. F. JOHNSON, *Clerk.*
ALEXANDER AKERMAN,
*Asst. U. S. Attorney.*

27 *Petition for writ of error and order.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

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| UNITED STATES OF AMERICA<br>*vs.*<br>HARVEY C. MILLER AND MORRIS F. MILLER. | Indictment No. 378. Indictment for violation of interstate commerce act. |

*Petition for writ of error.*

And now comes the United States of America, by Alexander Akerman, assistant United States attorney for the Southern District of Georgia, and says:

That on the 23rd day of March, A. D. 1911, the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, entered a judgment herein in favor of the defendants and against the United States of America, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of the United States of America, all of which will more in detail appear from the assignments of error which are filed with this petition.

Wherefore, the United States of America prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of the errors complained of, and that a transcript of the record, proceedings, and papers in this cause, duly authenticated, may be sent to the Supreme Court of the United States.

ALEXANDER AKERMAN,
*Assistant United States Attorney.*

And now, to wit, on this 18th day of April, A. D. 1911, it is ordered that the writ of error be allowed as prayed for.

EMORY SPEER,
*U. S. District Judge for Southern District of Georgia,*
*Presiding in said Circuit Court.*

28 (Indorsement:) No. 377. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States *vs.* Harvey C. Miller et al. Petition for writ of error and order allowing same. Filed April 19th, 1911.

T. F. JOHNSON, *Clerk.*
ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*

29 *Writ of error No. 378.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the Circuit Court of the United States in and for the Eastern Division of the Southern District of Georgia, Greeting:

Because in the record and proceedings, and also in the rendition of the judgment of a plea, which is in the said circuit before you, between the United States of America, plaintiff, and Harvey C. Miller and Morris F. Miller, defendants, a manifest error hath happened to the great damage of the said plaintiff, the United States of America, and it being fit, that the error, if any there hath been, should be duly corrected, and full and speedy justice done between the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Supreme Court, together with this writ, so that you have the same at the city of Washington on the 17th day of May next, in said Supreme Court of the United States to be there and then held that the record and proceedings aforesaid be inspected, and the said Supreme Court of the United States may cause further to be done therein to correct that error, what of right and according to the law and custom of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, this 18th day of April, in the year of our Lord one

thousand nine hundred and eleven, and of the independence of the United States the one hundred and thirty-fifth.

T. F. JOHNSON,
*Clerk of the Circuit Court of the United States of America for the Southern District of Georgia.*

The above writ of error is hereby allowed. This 18th day of April, 1911.

EMORY SPEER,
*United States District Judge, Presiding in said Circuit Court.*

30 Due and legal service of the foregoing writ of error acknowledged. All other and further service waived. April 18, 1911.

OSBORN & LAWRENCE,
*Attorneys for Harvey C. & Morris F. Miller, Defendants in Error.*

(Indorsement:) No. 378. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Writ of error. Filed April 19, 1911. T. F. Johnson, clerk. Alexander Akerman, assistant U. S. attorney.

31 *Citation No. 378.*

UNITED STATES OF AMERICA, *ss:*

*To Harvey C. Miller and Morris F. Miller:*

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington on the 17th day of May, A. D. 1911, pursuant to a writ of error on file in the clerk's office of the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia in that certain action wherein the United States of America is plaintiff in error and you, the said Harvey C. Miller and Morris F. Miller, are defendants in error, to show cause, if any there be, why the judgement given, made, and rendered against the said United States of America in said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

This 18th day of April, A. D. 1911.

EMORY SPEER,
*United States District Judge, Presiding in said Circuit Court.*

Due and legal service of the foregoing citation acknowledged. All other and further service is hereby waived. April 18, 1911.

OSBORN & LAWRENCE,
*Attorneys for Harvey C. and Morris F. Miller, Defendants in Error.*

(Indorsement:) No. 378. In the United States Circuit Court for the Eastern Division of the Southern District of Georgia. The United States vs. Harvey C. Miller et al. Citation on writ of error. Filed April 19, 1911.

T. F. JOHNSON, *Clerk.*
ALEXANDER AKERMAN,
*Assistant U. S. Attorney.*

32 *Clerk's certificate.*

In the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia.

THE UNITED STATES OF AMERICA
*versus*
HARVIE C. MILLER AND MORRIS F. MILLER.

*Writ of error to the Supreme Court of the United States.*

I, T. F. Johnson, clerk of the Circuit Court of the United States for the Eastern Division of the Southern District of Georgia, do hereby certify that the foregoing 31 pages comprise a true, complete, and correct copy of the record, bill of exceptions, assignment of errors, and all proceedings had in the case of the United States of America versus Harvie C. Miller and Morris F. Miller, No. 378, tried and determined in said Circuit Court at the last November term thereof, in which said indictment No. 378 was quashed on the 23rd day of March, 1911.

In witness whereof I have hereunto set my hand and affixed the seal of said court at Savannah, Georgia, this 9th day of May A. D. 1911.

[SEAL.] T. F. JOHNSON, *Clerk.*

(Indorsement on cover:) File No. 22684. S. Georgia C. C. U. S. Term No. 1063. The United States, plaintiff in error, vs. Harvey C. Miller and Morris F. Miller. Filed May 18th, 1911. File No. 22684.

# In the Supreme Court of the United States.

OCTOBER TERM, 1910.

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THE UNITED STATES, PLAINTIFF IN ERROR,
*v.*
HARVEY C. MILLER AND MORRIS F. Miller. } No. 1062.

THE UNITED STATES, PLAINTIFF IN ERROR,
*v.*
HARVEY C. MILLER AND MORRIS F. Miller. } No. 1063.

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*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.*

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## MOTION TO ADVANCE.

Defendants in error were indicted in the Circuit Court of the United States for the Southern District of Georgia at the November term, 1910, for unlawfully, knowingly, and willfully soliciting, accepting, and receiving a concession in respect to the transportation of certain property over the lines of common carriers engaged in interstate commerce, to wit, the Merchants & Miners' Transportation Co. and the Seaboard Air Line Railway, and the Merchants & Miners' Transportation Co. and the Atlantic Coast

Line Railroad Co., respectively, whereby such property, to wit, wheat in sacks, was transported at a less rate than that in the tariffs published and filed by such common carriers, in violation of the act to regulate commerce and the acts amendatory thereof. Demurrers were filed to the indictments on the ground that the Interstate Commerce Act, as amended, required that the schedule of rates should be posted by the common carriers, and that the indictment failed to allege that such posting had been done. The Government, on the other hand, contends that, under the law, it is not necessary to allege such posting. The demurrers were sustained and the indictments quashed. The cases are brought to this court under the Criminal Appeals Act, which requires that writs of error thereunder "shall be diligently prosecuted and shall have precedence over all other cases."

The Solicitor General therefore moves the court to advance the cases on the docket and assign them for hearing on a day convenient to the court during the October term, 1911.

Notice of this motion has been served on opposing counsel.

FREDERICK W. LEHMANN,
*Solicitor General.*

MAY, 1911.

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# In the Supreme Court of the United States.

OCTOBER TERM, 1911.

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| THE UNITED STATES, PLAINTIFF IN ERROR, v. HARVEY C. MILLER AND MORRIS F. Miller. | No. 607. |
| THE UNITED STATES, PLAINTIFF IN ERROR, v. HARVEY C. MILLER AND MORRIS F. Miller. | No. 608. |

*IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.*

## BRIEF AND ARGUMENT FOR THE UNITED STATES.

### STATEMENT.

Each of the above cases is upon an indictment of shippers for a violation of the Interstate Commerce Act. The two cases differ only in that different carriers are involved. As to the different counts of each indictment, they involve distinct transactions of the same character. We will deal, therefore, for the purposes of this brief only with the first count of the indictment in case No. 607.

This charges in formal and elaborate terms that the Merchants & Miners Transportation Company was a common carrier of property wholly by water from Philadelphia, in the State of Pennsylvania, to Savannah, in the State of Georgia; that the Seaboard Air Line Railway Company was a common carrier of property by rail from Savannah, in the State of Georgia, to Jacksonville, in the State of Florida, its road being operated by receivers appointed by the Federal court in Georgia; that these carriers had a common arrangement for the continuous carriage and shipment of property over their routes from Philadelphia to Jacksonville (R., 1); that schedules and tariffs, as required by law, were filed and kept on file with the Interstate Commerce Commission, and these schedules were printed and kept open to public inspection by the carriers, showing the joint rate and only lawful rate which the carriers had established and which was in force for the transportation of wheat in sacks between the cities and over the route stated; that both the carriers had filed their acceptance of this rate and had participated in it, and, by what they had done as aforesaid, had established a through joint rate for wheat in sacks from Philadelphia to Jacksonville (R., 2); that the defendants were partners doing business as grain merchants and knew that this through joint rate, which was fifteen cents per hundred pounds, had been established as aforesaid by the carriers, and yet "unlawfully did, knowingly and wilfully, solicit, accept, and receive a

concession" of five cents per hundred pounds on a carload of wheat in sacks, shipped by their firm from Philadelphia to Jacksonville on January 10, 1908, getting a rate of ten cents per hundred when they knew the established rate was fifteen cents. (R., 2, 3.)

The defendants filed a

**demurrer**

to the indictment (R., 21–24), challenging its sufficiency on various grounds, among others that it did not allege that this rate of fifteen cents per hundred had been "kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation," etc., etc.

Upon this ground, and upon this alone, the Circuit Court sustained the ~~indictment~~ demurrer as appears by its

**order.**

> The court being of the opinion that each count of the indictment is defective, in that it does not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law, the demurrer is sustained upon that ground. Each and every other ground of the demurrer is overruled. The indictment and each count thereof is, therefore, quashed and the defendants are hereby discharged. (R., 27.)

To secure a review of this order the United States brings the case here by writ of error.

**The question**

involved is simply this:

**The carriers having done everything prescribed by the statute with regard to a through joint rate for transportation over a through route under a common arrangement, except posting the printed schedules in two public and conspicuous places in every depot, etc., is a shipper who knows what the established rate is guilty of a violation of section one of the Elkins Act as amended by the Hepburn Act if he knowingly solicits, accepts, and receives a concession from that rate?**

ARGUMENT.

The question stated is determinable necessarily by the statute itself.

The statute in this respect, so far as it relates to the carriers, is section 6 of the Interstate Commerce Act, as amended by the Hepburn Act of June 29, 1906, 34 Stat. 584, 586, 587, and provides:

> "SEC. 6. *That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established.* If no joint rate over the through route has been established, the several carriers in such through route shall file, print and keep open to public inspection as aforesaid, the separately estab-

lished rates, fares, and charges applied to the through transportation. *The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried,* and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges and facilities granted or allowed and any rules or regulations, which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper, or consignee. *Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.* The provisions of this section shall apply to all traffic, transportation, and facilities defined in this Act.

* * * * *

"*No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act; nor shall any carrier charge or demand or collect or receive a greater or less or different compensation for such trans-*

> *portation of passengers or property, or for any service in connection therewith, between the points named in such tariffs than the rates, fares, and charges which are specified in the tariff filed and in effect at the time;* nor shall any carrier refund or remit in any manner or by any device any portion of the rates, fares, and charges so specified, nor extend to any shipper or person any privileges or facilities in the transportation of passengers or property, except such as are specified in such tariffs: *Provided,* That wherever the word 'carrier' occurs in this Act it shall be held to mean 'common carrier.'"

This statute plainly requires that the carrier shall, as a condition of engaging in interstate commerce, have an established rate from which it may not deviate, and this requirement of law the shipper is conclusively presumed to know.

That the shipper may readily ascertain what that established rate is, the law provides for posting it in printed form in each and every one of the carrier's depots, etc., where freight is received for transportation.

Section 1 of the Elkins Act, 32 Stat. 847, as amended by the Hepburn Act of June 29, 1906, 34 Stat. 584, 587, 588, provides:

> * * * The willful failure upon the part of any carrier subject to said Acts to file and publish the tariffs or rates and charges as required by said Acts, or strictly to observe such tariffs until changed according to law,

shall be a misdemeanor, and upon conviction thereof the corporation offending shall be subject to a fine of not less than one thousand dollars nor more than twenty thousand dollars for each offense; and *it shall be unlawful for any person, persons, or corporation to offer, grant, or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said Act to regulate commerce and the Acts amendatory thereof whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier, as is required by said Act to regulate commerce and the Acts amendatory thereof, or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall, knowingly, offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor*, and on conviction thereof shall be punished by a fine of not less than one thousand dollars nor more than twenty thousand dollars.

This act provides for an established rate which is binding equally upon the carrier and the shipper, and the conscious, wilful disregard of that rate by either of them is a misdemeanor.

What is necessary to the establishment of a rate? As to the carrier this may readily be answered. Section 1 of the Elkins Act, as amended by the Hep-

burn Act, in addition to what we have quoted above, provides (34 Stat. 588):

> * * * Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate commerce or Acts amendatory thereof, or participates in any rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate, and any departure from such rate, or any offer to depart therefrom, shall be deemed to be an offense under this section of this Act.

The filing of a rate with the Commission, publishing it in any way, or participating in a rate so filed or published, are any or all of them conclusive evidence of the legal or established rate as against the carrier. As there can not be one established rate for the carrier and another for the shipper, it follows that whatever establishes a rate for the carrier establishes the same rate for the shipper. It does not follow that in a criminal prosecution for accepting a less rate the shipper should be held to know what the rate is from its mere filing by the carrier with the Commission or its publication in some form, or participation in it by the carrier. These are acts of the carrier not necessarily brought home to the shipper or known to him. They are acts of the carrier, and the presumption of knowledge as to him, therefore, is conclusive.

That the shipper may be more readily informed as to the rate established, the statute provides, in addi-

tion to filing with the Commission and keeping open to public inspection, for posting the printed schedules in every depot, etc. This in terms is said to be for "the use of the public." Furthermore, it implies that the rates have already been established and a rate is established when determined upon by the carrier and filed with the Commission, or published or participated in by him.

The posting in the depots, etc., is not essential to the establishment of the rate and is required only to give general information of what it is.

If posting in the depots is essential to the establishment of the rate, then such posting is essential as the statute prescribes, viz, posting and keeping posted "in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation," etc. The keeping posted in this view is as essential as the posting, and so the inadvertent or mischievous act of a stranger destroying or removing a printed schedule from any depot along the line would disestablish the rate, and the fact might remain unknown to the carrier for months.

Proof of a violation of the act by a shipper would be rendered practically impossible, and certainly senselessly difficult, laborious, and expensive, if in every prosecution primary evidence of posting the schedules and keeping them posted in every depot were required. The shipper indeed might secure immunity by himself removing the schedule from some depot before applying for and getting his

concession, as the established rate would then no longer be in existence.

Every purpose of the law would be defeated if rates existed by so precarious a tenure. There must simply be a rate established by the carrier, and then if there is a wilful, conscious deviation from that rate there is a violation of the law. As to the shipper, inasmuch as the establishment of the rate is not his act, knowledge of it must be brought home to him, and the fact that it had been posted as prescribed by law would be *prima facie* evidence of knowledge by him. But knowledge might be shown in other ways. The carrier might inform him of the rate as filed with the Commission, or he might inform himself, and, knowing the rate, however he got the knowledge, if he solicited and accepted a less rate, he would be doing that which the law denounces as a misdemeanor, viz, "Knowingly soliciting, accepting, and receiving a rebate or concession" from the established rate.

The question has in effect been determined in *Texas and Pacific Ry. Co.* v. *Cisco Oil Mill*, 204 U. S. 449, l. c. 450–452.

That was a suit by the oil company to recover from the railroad company on account of alleged overcharges on four cars of cotton seed. The contention of the oil company was that the rates exacted were unreasonable, and that it was not precluded from its common law right of recovery, because the schedule of rates, although filed with the Interstate Commerce Commission, had not been posted in the carrier's depots as prescribed by the

statute, and so had not become legally effective. Overruling this contention, the court said:

> * * * This was based on the claim that it was not affirmatively found below that the schedule of rates applicable to the shipments in question had been posted as required by section 6 of the act to regulate commerce, noted in margin.
>
> The assumption, it is insisted, is authorized because, it is asserted, the conclusion that the schedule of rates became legally operative was not justified by the finding that such schedule had been filed with the Interstate Commerce Commission and copies thereof furnished to the freight officers of the railroad company at Cisco and other points. The contention is without merit. The filing of the schedule with the commission and the furnishing by the railroad company of copies to its freight offices incontrovertibly evidenced that the tariff of rates contained in the schedule had been established and put in force as mentioned in the first sentence of the section, and the railroad company could not have been heard to assert to the contrary. The requirement that schedules should be "posted in two public and conspicuous places in every depot," etc., was not made a condition precedent to the establishment and putting in force of the tariff of rates, but was a provision based upon the existence of an established rate, and plainly had for its object the affording of special facilities to the public for ascertaining the rates *actually in force*. To hold that the clause had the far-reaching effect claimed would be to say that

> it was the intention of Congress that the negligent posting by an employe of but one instead of two copies of the schedule, or the neglect to post either, would operate to cancel the previously established schedule, a conclusion impossible of acceptance. While section 6 forbade an increase or reduction of rates, etc., "which have been established and published as aforesaid," otherwise than as provided in the section, we think the publication referred to was that which caused the rates to become operative; and this deduction is fortified by the terms of section 10 of the act making it a criminal offense for a common carrier or its agent or a shipper or his employe improperly "to obtain transportation for property at less than the regular rates then established and in force on the line of transportation of such common carrier."

The above construction of section 6 practically disposes of the questions involved in the case at bar. It is true that the *Texas Pacific Railway Company* case concerns the construction of the section in a civil cause, but that "affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case." (*United States* v. *Keitel*, 211 U. S. 370, 392.)

True it is that the law has been amended since the *Cisco* case was decided, but a reading of the law as it then stood shows that there has been no addition to the requisites for the establishment of the rate. The old statute is set out in the margin of the *Cisco* case, and it reads:

> That every common carrier subject to the provisions of this act shall print and keep open to public inspection schedules showing the rates and fares and charges for the transportation of passengers and property which any such common carrier has established and which are in force at the time upon its route. The schedules printed as aforesaid by any such common carrier shall plainly state the places upon its railroad between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately the terminal charges and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates and fares and charges. Such schedules shall be plainly printed in large type, and copies for the use of the public shall be posted in two public and conspicuous places, in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected * * *.

As early as 1892, in *United States* v. *Howell* (56 Fed. Rep. 21), it was held as against shippers that the posting of rates in the depots was not essential to their establishment. The court said in charging the jury (p. 29):

> * * * You first are required to find, in addition to these propositions, that the said corporations, the ones which I have named, and that are set out in the indictment by the

name of the Chicago, Rock Island & Pacific Railroad Company, the Chicago, Kansas & Nebraska Railroad Company, and the St. Joseph & Iowa Railway Company, had established schedules or tariffs of transportation for persons and property along the lines of transportation of such common carriers. If a rate had been established, if it was known by the people in charge of these railroads as an established rate, as a fixed rate, having a uniform character, undertaking to treat all shippers alike in proportion to the distances shipped, if that rate was then and there a fixed rate of that character, in my judgment it is not necessary that it should be published by posting the rate up. That is a thing required by this law to be done by the railroad company for the information of the people, that this practice may not be indulged in by the shippers, and any companies may not discriminate in favor of one and against others, and, if these companies did not do that, there is a penalty attached to it; but that is a different duty from the one prescribed by this statute. If they have an established rate, if that rate is established, if it is so far established as to become a fixed rate under which they act, and parties as shippers, or parties as agents of common carriers, combined for the purpose of evading that rate, of getting an underrate in their favor, or of securing a discrimination as against the people generally, they may be held under this law which charges them with conspiring to do an unlawful act.

We know of no Federal case, other than the one at bar, in which the posting in depots has been held essential to the establishment of the rate. Cases may be found in which there has been question of what was necessary to prove knowledge on the part of the shipper, but that is not involved here, for actual knowledge is charged by the indictment.

The amendments made to the law since the *Cisco* case was decided were not designed to weaken it. On the contrary, every amendment manifests the purpose to guard more carefully than before against rebates, concessions, and discriminations, and shippers have been by the Hepburn Act involved in a common guilt with the carrier when the established rate is disregarded. "Every person or corporation, *whether carrier or shipper*, who shall knowingly offer, grant, or give, or solicit, accept, or receive any such rebates, concession, or discrimination shall be deemed guilty of a misdemeanor." The offense is the same in case of carrier or shipper, save that on the one side it is "offering, granting, or giving," and on the other "soliciting, accepting, or receiving." In each case it must be knowingly done. But that which is offered or solicited is the same thing—a "rebate, concession, or discrimination," whether looked at from the one side or the other. Different proof may be required to show knowledge, as the established rate is the act of the carrier and not of the shipper; but, *knowledge shown*, the act of the carrier sufficient to establish a rate as to himself is sufficient to establish it as to the shipper.

In the case at bar we have charged in the indictment (1) a rate established by the carrier, (2) knowledge by the defendants of what that rate was, and (3) the solicitation and acceptance of a lesser rate.

It is respectfully submitted that the requirements of the statute have been fulfilled, and that the judgment of the Circuit Court should be reversed.

F. W. LEHMANN,
*Solicitor General.*

OCTOBER, 1911.

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# Supreme Court of the United States

OCTOBER TERM, 1911

Number 607

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| THE UNITED STATES, Plaintiff in Error, vs. HARVEY C. MILLER and MAURICE F. MILLER, Defendants in Error. | Writ of Error to the Circuit Court of the U. S. for the Southern District of Georgia |

## BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

### STATEMENT OF THE CASE.

The Defendants in Error were indicted for violation of the Hepburn Act approved June 29th, 1906. They were charged with accepting a concession in respect to transportation of property in interstate commerce in that said prop-

erty was transported at a less rate than that published and filed by the carrier. There were seven counts. Each count consisted substantially of the same averments. Each count charges that the schedules and tariffs established by the carrier had been filed and kept on file with the Interstate Commerce Commission and were printed and kept open to public inspection by the common carriers.

Each count contains the following averments:

"And the Grand Jurors aforesaid, upon their oaths aforesaid do further present that during the period aforesaid * * * one H. C. Miller and one Maurice F. Miller acting for and on behalf of L. F. Miller & Sons unlawfully did knowingly and wilfully solicit, accept and receive a concession in respect to transportation of property in Interstate Commerce * * * whereby such property * * * was transported at a less rate than that named in the tariffs published and filed by such common carrier * * aforesaid as is required by said act to regulate Commerce and the acts amendatory thereof."

Each count defines and describes the publication made. With respect to the character of publication they allege.

"And the Grand Jurors aforesaid upon their oaths aforesaid do further present that before and during the said period schedules and tariffs (which are too voluminous to be here set forth) as required by law were filed, and kept on file with the Interstate Commerce Commissioners of the United States, and said schedules were printed and kept open to public inspection by said common carrier specifying the names of the said corporation common carriers and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over said through route for the transportation of certain property."

No count averred that the schedules had been printed or posted as required by the act regulating interstate commerce.

To each count of the indictment Defendants demurred among other grounds upon the following:

> "3. It does not in any of the counts thereof allege that the tariffs and schedules in question were posted in conformity with the acts of Congress.
>
> "4. It does not state in any of the counts how or in what manner the alleged schedules and tariffs were published or that they were published in the manner specified and prescribed by the act of Congress."

Upon the argument the Government conceded that it did not allege posting as a part of the publication and that it purposely refrained from so doing because it was unable to prove that the schedules had been posted.

> "It is frankly confessed in the argument that in point of fact it will be impossible to prove that such posting was done and was therefore not alleged."
>
> (See opinion of the Court, p. 26 of the Record.)

It was conceded upon the argument that no count alleged that the tariffs had been published as required by law. See opinion of the Court, p. 25 of Record.

The Court sustained the demurrer upon the ground that each count was defective in that it did not allege that the schedules and tariffs alleged to be filed were published by posting in the manner required by law.

## QUESTION TO BE DETERMINED.

"Is an indictment of a shipper for accepting a concession from a freight rate properly quashed when there is no averment therein that the rate in question had been posted in the freight station where the freight was received or elsewhere?"

## BRIEF

The second section of the Hepburn Act 34 U. S. Statutes-at-Large, pp. 587-8, contains the following clause:

> "And it shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs **published** and filed by such carrier **as is required by said act to regulate commerce and the acts amendatory thereof** or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept or receive any **such** rebates, concession or discrimination, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1,000.00 nor more than $20,000.00."

It is under this clause that Defendants were indicted.

A penalty is here provided for a shipper who solicits, accepts or receives concessions whereby any property shall by any device be transported at a less rate than that named

in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereof.

The two sentences constitute one clause and are to be read together. The first sentence makes the doing of certain acts unlawful, the second sentence affixes a penalty for doing such acts. The words any **such** rebates, concessions or discrimination in the second sentence necessarily refer to the concession (mentioned in the first sentence) whereby "property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by the said act to regulate commerce and the acts amendatory thereof."

It is thus made an offense for a shipper to solicit, accept or receive a concession from a rate which has been published and filed as provided by the several acts. It is not made an offense upon the part of the shipper to receive a concession from a rate which has not been published and filed, but to come within the penalty he must receive a concession from a rate which has been both published and filed as required by the several acts.

In this respect the act under consideration differs from the penal provisions of the Act of 1889, 25 Stat. L. 858. The penal provisions of the Act of 1889 were based upon a departure from a "**regular rate then established and in force,**" while the penal provisions of the Elkins and Hepburn Acts are based upon a departure from a rate "published and filed" as required by the Act of Congress. This difference is highly significant.

It is alleged in the indictment that the tariffs were filed and were published by being printed and kept open to public inspection by the common carrier; that the schedules specify the names of the corporation carriers and the rate, and the only rate which they had established. It does not aver that

the tariffs had been posted. These averments show what the pleader means by the averment in the indictment that the tariffs were filed and published. It shows that the pleader did not mean to include posting as a part of the publication.

The issue then is, is posting included in the phrase "published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereof," which phrase Congress used in defining the offense.

Printing and filing with the commissioners might be a publication in the most comprehensive sense, but when a statute provides the method of publication, then the word published derives its definition from the statute as in the case of publication of a notice and an ordinance passed upon by the New Jersey Supreme Court in State vs. Orange, 54 N. J. Law 111, and as in the case of depositing an obscene letter, in U. S. vs. Williams, 3 Federal 486-7. In the case at bar the statute defines the publication to be "as is required by said act to regulate commerce and the acts amendatory thereof," so to ascertain the meaning of the word published, the several acts to regulate commerce can alone be looked to.

The provisions of the several acts as to publication of rates are brought forward in the Act of June 29th, 1906, and are consolidated in Section 6 of the act as shown on page 586, 34 Statutes at Large. That provision is as follows:

> "Sec. 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water, when a through route and joint rate have been established. If no joint rate over the through route has been established, the sev-

eral carriers in such through route shall file, print and keep open to public inspection as aforesaid the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. **Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.** The provisions of this section shall apply to all traffic, transportation and facilities defined in this Act."

Inspection of the foregoing clause demonstrates that the posting of tariffs and schedules is a substantial part of the publication prescribed. It is the method designated by Congress for keeping open to public inspection. The first sentence of the clause requires the filing, printing, and keeping open to public inspection of separate and joint rates. The second sentence requires filing and printing and keeping the schedules open to public inspection where there are more than one carrier, but no joint rates. The third sentence prescribes the method of printing and the manner in which they should be kept open to public inspection. Congress here provides that the keeping open to public inspection should be accomplished by posting in two public and

conspicuous places in every depot where freight is received. The words at the end of the clause "in such form that they shall be **accessible to the public** and can be **conveniently inspected** shows that posting was intended by Congress to be the method devised for **keeping open to public inspection.** Each portion of the clause is dependent upon each other portion, and posting is as much a part of the publication as is the matter which the tariffs should contain.

As a condition of criminality the statute prescribes that the shipper must violate a tariff rate published as prescribed by the Act. The Act prescribes as a part of the publication that the tariffs should be posted in two conspicuous places where freight is received. It is admitted that the rates alleged to be violated were not so posted. It must follow that there is no offense. Where the statute prescribes a method of publication the Government may not in order to secure a conviction allege and show that it had been published only in part. It must allege and show that it was published in the manner prescribed by the statute. The statute prescribes that it shall be kept open to public inspection by posting at each depot where freight is received in such form that it shall be accessible to the public and can be **conveniently inspected.** Where there has been no posting the statute has not been violated, because as a condition precedent to the commission of the crime defined by the Act a shipper must violate a rate which has been filed and published in the manner prescribed by the Act.

This Court has had before it the provision of the Act of 1889 as to posting in the case of Texas Railway vs. Cisco Oil Mill, 204 U. S., 449. In that case this Court held that under the Act of 1887 as amended by the Act of March 2, 1889, in a controversy between the shipper and the carrier as to the amount of freight to be paid the shipper was bound to pay the established rate, though it had not been posted as required by the Act. This was held to be true because posting was not by that Act made a condition precedent to the establishment of the rate. In the concluding paragraph of the

opinion the question as to whether a failure to post would bring into operation the penal provisions of the Act of 1889 was left open.

In the later case of Armour Packing Company vs. United States, 209 U. S. 72, this Court recognizes the difference as to posting between the provisions of the Act of 1889 and the Elkins Act, where, speaking through Mr. Justice Day, it says:

> "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same condition, should be the one **established, published and posted as required** by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to, to obtain or receive concessions and rebates from the fixed rates, duly **posted** and published."

It will be observed that there is a clear distinction between the establishment of a rate so that the same shall be valid and effective as between shipper and carrier, and the publication of a rate so as to subject the rate to the operation of the penal provisions of the Hepburn Act. The filing and publication of the rate is not a condition precedent to its establishment. But filing and publication is a condition precedent to its coming within the operation of the penal provisions of the Elkins or Hepburn Acts.

Under Section 1 of the Act of 1887, 25 Statutes at Large, 379, the carrier is required to make reasonable charges. Under Sections 2 and 3 it is unlawful for the carrier to vary this rate so made; so that a railroad company being permitted to promulgate its own rates is prohibited from making any departure therefrom, so that both the shipper and

carrier must conform to the promulgated rate which is established whether filed or published.

This is decided by the Cisco case as well by the Abilene Cotton Co.'s case, 204 U. S., 437-438, but the civil and penal provisions are not commingled, nor are they identical. While neither the filing or publication of the rate is a condition precedent to its establishment, validity or effectiveness from a civil standpoint, both filing and publishing are under the Hepburn Act, conditions precedent to the penal operation of the statute with respect to the shipper, for the statute in its penal provision relative to the shipper denounces only departure from a rate which has been "published and filed * * * as is required by said Act to regulate Commerce and the acts amendatory thereof."

The distinction between an established and a published rate and the consequences of a departure therefrom by a shipper are clear. If the rate be established by promulgation without filing and publishing it is binding upon both a shipper and carrier and each is bound to conform thereto and each may compel the other to conform thereto, but the shipper does not by a departure from the rate subject himself to the penal provisions of the Hepburn Act, because it is only penal, under this Statute to accept a concession from a rate which is both filed and published.

The Cisco case in effect controls this proposition. The Court there having under consideration the question of civil liability of a shipper to a carrier as to a rate which had been established, but had not been posted, held that the rate was binding because posting was not a **condition precedent** to its establishment. The clear and necessary inference therefrom is that if the posting had been a condition precedent to the establishment of the rate the result would have been otherwise. It follows that posting being a condition precedent to the operation of the penal provision of the statute under

consideration, no departure from an unposted rate subjects the shipper to such penal provisions.

The case of Hardaway vs. State, 1 Ga., App. Rpts., 150, 58 S. E. Rptr., 141, is instructive and in principle controls this case. A Statute of Georgia made it unlawful for any person to hunt upon lands of another when a notice prohibiting hunting was posted in two or more places on each tract of land and where the land owner had registered the land giving a description of the land, etc. The indictment charged Hardaway with hunting upon land which had been posted, but not in conformity with the Act. It charged him with hunting upon land which had been registered, but not in conformity with the Act. The Court held the indictment defective. It said:

> "Construing all these sections of the Act together, we think it clear that before it becomes an offense to hunt on the lands of another the following facts must exist: First, the land-owner shall post a notice in two or more places on each tract of land, forbidding all persons to hunt thereon. Second, said land-owner shall register his name in the register for posting lands, stating in the presence of the officers in charge of said book that the two notices have already been posted upon each tract of land, third, at the time of the registering of the name of the land-owner and the posting of the land, the land-owner shall also register a description of the land that has been posted, giving the district in which said land is located, and either the numbers of the lots or other description of the land, sufficient to put the public on notice of the land referred to. What the act requires shall be done to constitute the offense should be alleged in the indictment and shown by the evidence. The omission of either one of these essential allegations is fatal to the indictment. We therefore hold that the Court erred in not sustaining the demurrer on the first

and second grounds, and that the judgment of the Superior Court in overruling the certiorari was error."

The soundness of this decision cannot be questioned.

> "What the act requires should be done to constitute the offense, should be alleged in the indictment and shown by the evidence. The omission of either one of these essential allegations is fatal to the indictment."

The principle here announced is elementary as well as fundamental. It is but a restatement of the principle announced by this Court in the case of U. S. vs. Cook, 84 U. S. 174, wherein it said:

> "With rare exceptions offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad and may be quashed on motion or the judgment may be arrested or reversed on error."

The correctness of the application of the principle is apparent and the analogy of the Hardaway case with the case at bar is complete. The civil and criminal liability of hunting upon the lands of another are separate and distinct. Civilly one who hunts upon the lands of another is a trespasser and is liable to the land owner for the damage done, but the hunter is not liable unless the prohibition of the land owner has been published. A compliance with the statute by registering the name of the land owner is not sufficient. A compliance by mere registration is not sufficient. A description of the land must be given. Publication by registering and giving a description of the land is not complete, but notices must be posted in two places on each tract of land. There may be registration and description but the publication is not complete and huntin ; upon the land is not a crime unless notices are posted in conformity with the act.

So likewise with the case of a shipper. Under the Interstate Commerce Act and its amendments, if the rate be established by promulgation and enforcement, the shipper is civilly liable to the carrier for the full amount of the rate, but in a criminal case between the Government and the shipper there is no criminal liability by virtue of the establishment of the rate, but the rate must be filed and published, and the publication includes printing and posting as provided by the act. "The omission of either one of these essentials is fatal to an indictment for it is only where each thing which the act requires to be done is done that an offense is committed." In the case of a hunter the land might be registered and a description given, but if the notices were not posted in conformity with the requirements of the act the hunter might, though he knew of the registration, hunt upon the land, knowing that he would be civilly liable for damages for his trespass, but not for the penal liability. His knowledge of the prohibition would not make him guilty. In like manner, under the Act of 1906, a shipper, who knew a rate had been filed and printed but not posted, might accept a lower rate, knowing that he would have to refund the difference if called upon, and knowing further that he was not criminally liable. Still he would not be guilty of an offense. Because an essential element of the crime did not exist, that is a rate which though filed and printed had not been published by posting. In such case his knowledge of the established rate would not make him guilty. To be guilty there must be, and have been a filed, printed and posted rate, and to be guilty the shipper must have violated this rate knowing that it was a rate which had been filed, posted and printed. It is such knowledge and such knowledge alone which is guilty knowledge. The mere knowledge that a rate has been established, but not published as required by the act, is not guilty knowledge and will not operate to make the shipper guilty of an offense.

The opinion of the Circuit Court in the case of U. S. vs. Wood, 145 Federal 409-10, where the Court said:

> "In other words, it may be unlawful for a carrier to give a rebate concession or discrimination on a joint tariff filed by it or on joint tariff published by it, or on a joint tariff in which it participated when published by another, **but it is only unlawful for a shipper to receive a rebate on a tariff which is both filed and published.**"

And the opinion of the Circuit Court of Appeals in the Case of Camden Iron Works vs. U. S., 158 Fed., 564, where the Court said:

> "In other words, we are not called upon to determine whether the Mutual Transit Co. was required to file a tariff or to join in those of the Railroad Companies or to file an acceptance of them. For to relieve the Camden Iron Works from the charge of crime it suffices that none of these things was in fact done."

are in so far as the question at issue is concerned in exact accord with the Hardaway case and with the views we have expressed.

Upon the argument in the Court below counsel for the Government cited U. S. vs. Howell, 56 Fed., 21, Chicago R. R. vs. U. S., 162 Fed., 838; Cisco case, 204 U. S., 449-452 and U. S. vs. N. Y. Cen. & Hudson R. R., 212 U. S., 509, 515; and 157 Fed., 293.

We have no quarrel with either of these decisions. In the Howell case the indictment charges a conspiracy between lumber merchants and an employee of a carrier to obtain less than the established rates by false weighing of the lumber shipped. The indictment was brought under Section 5440 and the tenth section of the Act of 1889 contained in 25 Statutes at Large, 858. Under this tenth section it was made penal to obtain by false weighing, transportation of property at less than the regular rates then established and

in force. It will be observed that the language of this statute is altogether different from that of the Hepburn Act now under consideration. Under the 10th section of the Act of 1889, it is not a condition precedent to criminal liability that the rate be filed and published. It is only necessary that it be **established and in force.** This makes a clear distinction. Clearly posting is not an element of the offense for which Howell was prosecuted, but as that prosecution was under an entirely different statute it is not authority for the construction sought to be given by the Government to the Hepburn Act. As we have before pointed out a distinguishing feature between the penal provisions of the Act of 1889 and the Hepburn Act is that the former is based upon departure by false billing, etc., from a rate "established and in force" while the latter is based upon a departure from a rate which has been "filed and published."

The case of Chicago Railway vs. U. S., 162 Fed., 838, was a case against a carrier for granting a concession. The Court there decided that under the Elkins Act "the substantial elements of the offense are few (1) The granting or giving of a rebate, (2) from the published and filed rates (3) for the transportation of property (4) by a carrier engaged in Interstate Commerce." The Government cites this decision in support of the proposition that the words "published and filed rates" are exhaustive and exclude posting. The decision is sound. It is true it uses the words "published and filed rates" but posting is included in and is a part of publishing. The statement of the Court would have been more accurate if it had quoted the statute and said rates "published and filed as is required by said Act to regulate Commerce and the acts amendatory thereof." Congress was careful to require the publication to be made as required by the statute wherein posting was included as a part of the publication and it was not necessary for the Court to enumerate each element of publication, but when it used the word "published" it was used in the sense of

the statutory definition and included all the elements of publication made necessary by the statute.

As to the Cisco case, 204 U. S., 449, we have already shown that it decided that in a civil case arising under the Act of 1889 the shipper was bound if the rates were established and in force though not posted; that the posting requirement under that act was not a condition precedent to an establishment of the rate. Inferentially it holds that if posting were a condition precedent (as is true of the Hepburn Act in its criminal aspect), the rate which the Court there had under consideration could not have been enforced.

As to the case of U. S. vs. N. Y. R. R., 157, Fed., 293 and 212, U. S., 509. In the first case the Circuit Court held that an indictment under the Elkins Act was defective because it did not allege that the rate alleged to have been violated had been published and filed by the Defendant, though it had been published and filed by another carrier in which rate the Defendant participated. This Court in the last named case upon writ of error reversed the Court below because of the provision in the Elkins Act which is brought forward in the Hepburn Act.

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate Commerce or acts amendatory thereof or participates in rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of the Act."

Neither of these cases involves the construction of the act in reference to posting. It is established by them that

a carrier which participates in a rate filed or published by another carrier is by virtue of the foregoing clause made liable to the penal provisions of the Statute for any concession granted.

No authority can be found for excluding posting from the definition of publishing as used in the Elkins and Hepburn Acts. They are highly penal statutes and of course must be construed with the greatest strictness. Without violence to the language used, posting cannot be excluded. In the parts of the statute which make the acceptance of concessions penal, the penalty is made conditional upon the publishing of the rate—not publishing in a general sense, but publication as required by the Act. Congress does not leave its meaning as to the word published to mere conjecture and in section 2 of the Hepburn Act it prescribes the method of publication. It makes the posting as much a part of the method of publication as it does the requirement as to the method of printing. In the first sentence it provides that the tariffs shall be kept open to public inspection. In the last sentence it prescribes that they shall be printed and posted in such form that they shall be accessible to the **public** and can be **conveniently** inspected. Surely Congress intended the connection between the first and last sentences which the language necessarily imports.

If Congress had not intended publication as defined by the Act (which definition includes posting) to be a condition precedent to the operation of the penal provisions of the Hepburn Act, it would have used the words "established and in force" as it did in the Act of 1889, 24 St. L., p. 858. Congress intended with reference to the Act of 1906, that the rate upon which its penal provisions were based should be more than established and in force. It intended that for penal purposes the rate should be established by filing and publishing, and provided the method of publication which included posting.

There is good reason for Congress to have made the requirement as to posting. In no other way might the rates be readily accessible to the shipper or open to convenient inspection. As said by the Court below, in its opinion:

> "Now, how valuable is this provision if the shipper whose home is remote from the files of the Interstate Commerce Commission? How valuable to the plain or humble man to whom at times, perhaps, the station agent may not impart the information as to the legal rate as ungrudgingly and cheerfully as he ought to do? If the law as to posting is complied with, the shipper does not need to inquire elsewhere.
>
> "This Court has little regard for unessential technicalities, but this provision for the posting of the rate of interstate transportation near the home of the people is regarded as of inestimable value to the shipping public."

Congress has been most careful to protect the shipper from the penal operation of the Act. It made the shipper criminally liable only where he violated a rate which had been filed and published as prescribed by the statute, but it added the above-quoted provision, to-wit:

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof or participates in rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of the Act."

whereby the carrier is made criminally liable if it violated a rate which has been either filed or published, so that the shipper can only be guilty when he violates a rate which has

been both filed and published as prescribed by the Act, while the carrier is guilty if the rate be filed, but not published or published but not filed. These distinctions made by Congress between the shipper and the carrier are significant. It was not necessary for Congress to provide requirements for the knowledge of the carrier. If it filed a rate the carrier knew what was in it, but as to the shipper it was most necessary to make and enforce requirements which would enable him to learn the rates, learn them himself by opportunity for convenient inspection, not second-hand from an agent of the carrier, consequently Congress required the carrier to print its schedules in large type and post them in each office where business is transacted and in such manner that they are "accessible to the public and can be conveniently inspected." This was done for the purpose of giving opportunity for information to the shipper and he was only made liable if he violated a rate as to which the carrier has done its full duty as to filing and publication, while on the other hand the carrier is penalized if it did not file and publish the rates as required by the Acts and also if it violated a rate which has been either filed or published—not in the manner required by the Acts—but published in any manner.

Upon the argument in the Court below, counsel for the Government contended that a construction of the Act which required posting of a rate as a condition precedent to criminality would be unreasonable as it would then be incumbent upon the Government in order to make out a case to prove posting at every office at which freight was received. We think this contention without merit, and that the Court below adopted the rational view, when it held that the provision was a relative one, and that its conditions would be satisfied if proof of posting at the office at which the freight in question was received were made. It is a reasonable requirement that the rate be so posted that the shipper may have access to it, and it is not unreasonable to require the Government to allege and prove that the rates were so posted at the office where the freight was received that the indicted shipper had

an opportunity to conveniently inspect the same. It would be an unreasonable construction to strike this useful condition from the statute. All rules provide for a reasonable construction of a statute, but no rule permits a plain provision of a statute to be stricken and nullified merely because it is inconvenient for one party to comply with it; especially is this true where a reasonable and rational construction may be given, whereby the intent of Congress may be carried out and neither party suffer inconvenience.

We think the history of the Interstate Commerce Act as to its penal features will show an intention upon the part of Congress to make posting of a rate an essential element of the offense for which Defendants are indicted. The original Act made no provision for criminal offenses against shippers. The Act of 1889 provided that a shipper who by a fraudulent device procured a reduction from a rate which was established and in force, should be guilty of a crime. The Elkins Act (the Hepburn Act is as to this question identical) created an offense which involved no element of fraud, so that a person accepting a concession would be guilty of a crime though he were innocent of fraudulent act or intent. Armour Packing Company, 209 U. S. pp. 69-71. The Act of 1889 made a fraudulent departure from an established rate a crime. The Elkins and Hepburn Acts make a knowing but innocent departure from a filed and published rate a crime. They make posting a part of the publication. Why this difference between an established rate and a filed and published rate? Is it not that the fraud which was involved under the Act of 1889 necessarily involved knowledge of the rate, so that it was unnecessary to make posting or other publication an essential? While under the later Acts wherein fraud is not an element it was deemed essential to provide every opportunity for information by requiring publication by printing and by posting so that the shipper should have ready and easy access to the rate, a departure from which would subject him to a heavy penalty.

Is not this the intention which this Court discovered when reviewing the foregoing acts in Armour Packing Co. vs. U. S., 209 U. S. p. 72, it said:

> "That the only rate charged to any shipper * * * should be the one established, published and posted as required by law." * * *

Clearly the only reasonable construction which can be given to the statute is that contended for by ourselves and adopted by the Court below. The clear intention of Congress was to make the shipper guilty of a crime only in the event that he violated a rate which he knew had been filed, and published (published by keeping open to public inspection), by printing and posting in such manner that it shall be accessible to the public and can be conveniently inspected. Without violence to the language used, can any other intention be discovered?

Clearly the Court below was correct in holding that posting was a part of the publication and we respectfully insist that its judgment should be affirmed.

Respectfully submitted,

M. HAMPTON TODD,
WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
*Attorneys for Defendant in Error.*

# Supreme Court of the United States

OCTOBER TERM, 196[illegible]

No. [illegible]

THE UNITED STATES,
Petitioner,
v.
[illegible],
Respondent.

[illegible]

# Supreme Court of the United States

OCTOBER TERM, 1911

Number 608

| | |
|---|---|
| THE UNITED STATES, Plaintiff in Error, vs. HARVEY C. MILLER and MAURICE F. MILLER, Defendants in Error. | Writ of Error to the Circuit Court of the U. S. for the Southern District of Georgia |

## BRIEF AND ARGUMENT OF COUNSEL FOR DEFENDANT IN ERROR.

### STATEMENT OF THE CASE.

The Defendants in Error were indicted for violation of the Hepburn Act approved June 29th, 1906. They were charged with accepting a concession in respect to transportation of property in interstate commerce in that said prop-

erty was transported at a less rate than that published and filed by the carrier. There were three counts. Each count consisted substantially of the same averments. Each count charges that the schedules and tariffs established by the carrier had been filed and kept on file with the Interstate Commerce Commission and were printed and kept open to public inspection by the common carriers.

Each count contains the following averments:

"And the Grand Jurors aforesaid, upon their oaths aforesaid do further present that during the period aforesaid * * * one H. C. Miller and one Maurice F. Miller acting for and on behalf of L. F. Miller & Sons unlawfully did knowingly and wilfully solicit, accept and receive a concession in respect to transportation of property in Interstate Commerce * * * whereby such property * * * was transported at a less rate than that named in the tariffs published and filed by such common carrier as aforesaid as is required by said act to regulate Commerce and the acts amendatory thereof."

Each count defines and describes the publication made. With respect to the character of publication they allege.

"And the Grand Jurors aforesaid upon their oaths aforesaid do further present that before and during the said period schedules and tariffs (which are too volumnious to be here set forth) as required by law were filed, and kept on file with the Interstate Commerce Commissioners of the United States, and said schedules were printed and kept open to public inspection by said common carrier specifying the names of the said corporation common carriers and showing among other things the joint rate and the only lawful rate which the said corporation common carriers had established and which was in force throughout the said period over said through route for the transportation of certain property."

No count averred that the schedules had been printed or posted as required by the act regulating interstate commerce.

To each count of the indictment Defendants demurred among other grounds upon the following:

> "3. It does not in any of the counts thereof allege that the tariffs and schedules in question were posted in conformity with the acts of Congress.
>
> "4. It does not state in any of the counts how or in what manner the alleged schedules and tariffs were published or that they were published in the manner specified and prescribed by the act of Congress."

Upon the argument the Government conceded that it did not allege posting as a part of the publication and that it purposely refrained from so doing because it was unable to prove that the schedules had been posted.

> "It is frankly confessed in the argument that in point of fact it will be impossible to prove that such posting was done and was therefore not alleged."

(See opinion of the Court pp. 13 and 14.)

It was conceded upon the argument that no count alleged that the tariffs had been published as required by law. See opinion of the Court, p. 13 of record.

The Court sustained the demurrer upon the ground that each count was defective in that it did not allege that the schedules and tariffs alleged to be filed were published by posting in the manner required by law.

## QUESTION TO BE DETERMINED.

"Is an indictment of a shipper for accepting a concession from a freight rate properly quashed when there is no averment therein that the rate in question had been posted in the freight station where the freight was received or elsewhere?"

## BRIEF

The second section of the Hepburn Act 34 U. S. Statutes-at-Large, pp. 587-8, contains the following clause:

> "And it shall be unlawful for any person, persons or corporation to offer, grant or give, or to solicit, accept or receive any rebate, concession or discrimination in respect to the transportation of any property in interstate or foreign commerce by any common carrier subject to said act to regulate commerce and the acts amendatory thereof, whereby any such property shall by any device whatever be transported at a less rate than that named in the tariffs **published** and filed by such carrier **as is required by said act to regulate commerce and the acts amendatory thereof** or whereby any other advantage is given or discrimination is practiced. Every person or corporation, whether carrier or shipper, who shall knowingly offer, grant, or give, or solicit, accept or receive any **such** rebates, concession or discrimination, shall be guilty of a misdemeanor and on conviction thereof shall be punished by a fine of not less than $1,000.00 nor more than $20,000.00."

It is under this clause that Defendants were indicted.

A penalty is here provided for a shipper who solicits, accepts or receives concessions whereby any property shall by any device be transported at a less rate than that named

in the tariffs published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereof.

The two sentences constitute one clause and are to be read together. The first sentence makes the doing of certain acts unlawful, the second sentence affixes a penalty for doing such acts. The words any **such** rebates, concessions or discrimination in the second sentence necessarily refer to the concession (mentioned in the first sentence) whereby "property shall by any device whatever be transported at a less rate than that named in the tariffs published and filed by such carrier as is required by the said act to regulate commerce and the acts amendatory thereof."

It is thus made an offense for a shipper to solicit, accept or receive a concession from a rate which has been published and filed as provided by the several acts. It is not made an offense upon the part of the shipper to receive a concession from a rate which has not been published and filed, but to come within the penalty he must receive a concession from a rate which has been both published and filed as required by the several acts.

In this respect the act under consideration differs from the penal provisions of the Act of 1889, 25 Stat. L. 858. The penal provisions of the Act of 1889 were based upon a departure from a "**regular rate then established and in force,**" while the penal provisions of the Elkins and Hepburn Acts are based upon a departure from a rate "published and filed" as required by the Act of Congress. This difference is highly significant.

It is alleged in the indictment that the tariffs were filed and were published by being printed and kept open to public inspection by the common carrier; that the schedules specify the names of the corporation carriers and the rate, and the only rate which they had established. It does not aver that

the tariffs had been posted. These averments show what the pleader means by the averment in the indictment that the tariffs were filed and published. It shows that the pleader did not mean to include posting as a part of the publication.

The issue then is, is posting included in the phrase "published and filed by such carrier as is required by said act to regulate commerce and the acts amendatory thereof," which phrase Congress used in defining the offense.

Printing and filing with the commissioners might be a publication in the most comprehensive sense, but when a statute provides the method of publication, then the word published derives its definition from the statute as in the case of publication of a notice and an ordinance passed upon by the New Jersey Supreme Court in State vs. Orange, 54 N. J. Law 111, and as in the case of depositing an obscene letter, in U. S. vs. Williams, 3 Federal 486-7. In the case at bar the statute defines the publication to be "as is required by said act to regulate commerce and the acts amendatory thereof," so to ascertain the meaning of the word published, the several acts to regulate commerce can alone be looked to.

The provisions of the several acts as to publication of rates are brought forward in the Act of June 29th, 1906, and are consolidated in Section 6 of the act as shown on page 586, 34 Statutes at Large. That provision is as follows:

> "Sec. 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water, when a through route and joint rate have been established. If no joint rate over the through route has been established, the sev-

eral carriers in such through route shall file, print and keep open to public inspection as aforesaid the separately established rates, fares and charges applied to the through transportation. The schedules printed as aforesaid by any such common carrier shall plainly state the places between which property and passengers will be carried, and shall contain the classification of freight in force, and shall also state separately all terminal charges, storage charges, icing charges, and all other charges which the Commission may require, all privileges or facilities granted or allowed and any rules or regulations which in any wise change, affect, or determine any part or the aggregate of such aforesaid rates, fares, and charges, or the value of the service rendered to the passenger, shipper or consignee. **Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently inspected.** The provisions of this section shall apply to all traffic, transportation and facilities defined in this Act."

Inspection of the foregoing clause demonstrates that the posting of tariffs and schedules is a substantial part of the publication prescribed. It is the method designated by Congress for keeping open to public inspection. The first sentence of the clause requires the filing, printing, and keeping open to public inspection of separate and joint rates. The second sentence requires filing and printing and keeping the schedules open to public inspection where there are more than one carrier, but no joint rates. The third sentence prescribes the method of printing and the manner in which they should be kept open to public inspection. Congress here provides that the keeping open to public inspection should be accomplished by posting in two public and

conspicuous places in every depot where freight is received. The words at the end of the clause "in such form that they shall be **accessible to the public** and can be **conveniently inspected** shows that posting was intended by Congress to be the method devised for **keeping open to public inspection.** Each portion of the clause is dependent upon each other portion, and posting is as much a part of the publication as is the matter which the tariffs should contain.

As a condition of criminality the statute prescribes that the shipper must violate a tariff rate published as prescribed by the Act. The Act prescribes as a part of the publication that the tariffs should be posted in two conspicuous places where freight is received. It is admitted that the rates alleged to be violated were not so posted. It must follow that there is no offense. Where the statute prescribes a method of publication the Government may not in order to secure a conviction allege and show that it had been published only in part. It must allege and show that it was published in the manner prescribed by the statute. The statute prescribes that it shall be kept open to public inspection by posting at each depot where freight is received in such form that it shall be accessible to the public and can be **conveniently inspected.** Where there has been no posting the statute has not been violated, because as a condition precedent to the commission of the crime defined by the Act a shipper must violate a rate which has been filed and published in the manner prescribed by the Act.

This Court has had before it the provision of the Act of 1889 as to posting in the case of Texas Railway vs. Cisco Oil Mill, 204 U. S., 449. In that case this Court held that under the Act of 1887 as amended by the Act of March 2, 1889, in a controversy between the shipper and the carrier as to the amount of freight to be paid the shipper was bound to pay the established rate, though it had not been posted as required by the Act. This was held to be true because posting was not by that Act made a condition precedent to the establishment of the rate. In the concluding paragraph of the

opinion the question as to whether a failure to post would bring into operation the penal provisions of the Act of 1889 was left open.

In the later case of Armour Packing Company vs. United States, 209 U. S. 72, this Court recognizes the difference as to posting between the provisions of the Act of 1889 and the Elkins Act, where, speaking through Mr. Justice Day, it says:

> "The Elkins Act proceeded upon broad lines and was evidently intended to effectuate the purpose of Congress to require that all shippers should be treated alike, and that the only rate charged to any shipper for the same service, under the same condition, should be the one **established, published and posted as required** by law. It is not so much the particular form by which or the motive for which this purpose was accomplished, but the intention was to prohibit any and all means that might be resorted to, to obtain or receive concessions and rebates from the fixed rates, duly **posted** and published."

It will be observed that there is a clear distinction between the establishment of a rate so that the same shall be valid and effective as between shipper and carrier, and the publication of a rate so as to subject the rate to the operation of the penal provisions of the Hepburn Act. The filing and publication of the rate is not a condition precedent to its establishment. But filing and publication is a condition precedent to its coming within the operation of the penal provisions of the Elkins or Hepburn Acts.

Under Section 1 of the Act of 1887, 25 Statutes at Large, 379, the carrier is required to make reasonable charges. Under Sections 2 and 3 it is unlawful for the carrier to vary this rate so made; so that a railroad company being permitted to promulgate its own rates is prohibited from making any departure therefrom, so that both the shipper and

carrier must conform to the promulgated rate which is established whether filed or published.

This is decided by the Cisco case as well by the Abilene Cotton Co.'s case, 204 U. S., 437-438, but the civil and penal provisions are not commingled, nor are they identical. While neither the filing or publication of the rate is a condition precedent to its establishment, validity or effectiveness from a civil standpoint, both filing and publishing are under the Hepburn Act, conditions precedent to the penal operation of the statute with respect to the shipper, for the statute in its penal provision relative to the shipper denounces only departure from a rate which has been "published and filed * * * as is required by said Act to regulate Commerce and the acts amendatory thereof."

The distinction between an established and a published rate and the consequences of a departure therefrom by a shipper are clear. If the rate be established by promulgation without filing and publishing it is binding upon both a shipper and carrier and each is bound to conform thereto and each may compel the other to conform thereto, but the shipper does not by a departure from the rate subject himself to the penal provisions of the Hepburn Act, because it is only penal, under this Statute to accept a concession from a rate which is both filed and published.

The Cisco case in effect controls this proposition. The Court there having under consideration the question of civil liability of a shipper to a carrier as to a rate which had been established, but had not been posted, held that the rate was binding because posting was not a **condition precedent** to its establishment. The clear and necessary inference therefrom is that if the posting had been a condition precedent to the establishment of the rate the result would have been otherwise. It follows that posting being a condition precedent to the operation of the penal provision of the statute under

consideration, no departure from an unposted rate subjects the shipper to such penal provisions.

The case of Hardaway vs. State, 1 Ga., App. Rpts., 150, 58 S. E. Rptr., 141, is instructive and in principle controls this case. A Statute of Georgia made it unlawful for any person to hunt upon lands of another when a notice prohibiting hunting was posted in two or more places on each tract of land and where the land owner had registered the land giving a description of the land, etc. The indictment charged Hardaway with hunting upon land which had been posted, but not in conformity with the Act. It charged him with hunting upon land which had been registered, but not in conformity with the Act. The Court held the indictment defective. It said:

> "Construing all these sections of the Act together, we think it clear that before it becomes an offense to hunt on the lands of another the following facts must exist: First, the land-owner shall post a notice in two or more places on each tract of land, forbidding all persons to hunt thereon. Second, said land-owner shall register his name in the register for posting lands, stating in the presence of the officers in charge of said book that the two notices have already been posted upon each tract of land, third, at the time of the registering of the name of the land-owner and the posting of the land, the land-owner shall also register a description of the land that has been posted, giving the district in which said land is located, and either the numbers of the lots or other description of the land, sufficient to put the public on notice of the land referred to. What the act requires shall be done to constitute the offense should be alleged in the indictment and shown by the evidence. The omission of either one of these essential allegations is fatal to the indictment. We therefore hold that the Court erred in not sustaining the demurrer on the first

and second grounds, and that the judgment of the Superior Court in overruling the certiorari was error."

The soundness of this decision cannot be questioned.

> "What the act requires should be done to constitute the offense, should be alleged in the indictment and shown by the evidence. The omission of either one of these essential allegations is fatal to the indictment."

The principle here announced is elementary as well as fundamental. It is but a restatement of the principle announced by this Court in the case of U. S. vs. Cook, 84 U. S. 174, wherein it said:

> "With rare exceptions offenses consist of more than one ingredient, and in some cases of many, and the rule is universal that every ingredient of which the offense is composed must be accurately and clearly alleged in the indictment, or the indictment will be bad and may be quashed on motion or the judgment may be arrested or reversed on error."

The correctness of the application of the principle is apparent and the analogy of the Hardaway case with the case at bar is complete. The civil and criminal liability of hunting upon the lands of another are separate and distinct. Civilly one who hunts upon the lands of another is a trespasser and is liable to the land owner for the damage done, but the hunter is not liable unless the prohibition of the land owner has been published. A compliance with the statute by registering the name of the land owner is not sufficient. A compliance by mere registration is not sufficient. A description of the land must be given. Publication by registering and giving a description of the land is not complete, but notices must be posted in two places on each tract of land. There may be registration and description but the publication is not complete and hunting upon the land is not a crime unless notices are posted in conformity with the act.

So likewise with the case of a shipper. Under the Interstate Commerce Act and its amendments, if the rate be established by promulgation and enforcement, the shipper is civilly liable to the carrier for the full amount of the rate, but in a criminal case between the Government and the shipper there is no criminal liability by virtue of the establishment of the rate, but the rate must be filed and published, and the publication includes printing and posting as provided by the act. "The omission of either one of these essentials is fatal to an indictment for it is only where each thing which the act requires to be done is done that an offense is committed." In the case of a hunter the land might be registered and a description given, but if the notices were not posted in conformity with the requirements of the act the hunter might, though he knew of the registration, hunt upon the land, knowing that he would be civilly liable for damages for his trespass, but not for the penal liability. His knowledge of the prohibition would not make him guilty. In like manner, under the Act of 1906, a shipper, who knew a rate had been filed and printed but not posted, might accept a lower rate, knowing that he would have to refund the difference if called upon, and knowing further that he was not criminally liable. Still he would not be guilty of an offense. Because an essential element of the crime did not exist, that is a rate which though filed and printed had not been published by posting. In such case his knowledge of the established rate would not make him guilty. To be guilty there must be, and have been a filed, printed and posted rate, and to be guilty the shipper must have violated this rate knowing that it was a rate which had been filed, posted and printed. It is such knowledge and such knowledge alone which is guilty knowledge. The mere knowledge that a rate has been established, but not published as required by the act, is not guilty knowledge and will not operate to make the shipper guilty of an offense.

The opinion of the Circuit Court in the case of U. S. vs. Wood, 145 Federal 409-10, where the Court said:

> "In other words, it may be unlawful for a carrier to give a rebate concession or discrimination on a joint tariff filed by it or on joint tariff published by it, or on a joint tariff in which it participated when published by another, **but it is only unlawful for a shipper to receive a rebate on a tariff which is both filed and published.**"

And the opinion of the Circuit Court of Appeals in the Case of Camden Iron Works vs. U. S., 158 Fed., 564, where the Court said:

> "In other words, we are not called upon to determine whether the Mutual Transit Co. was required to file a tariff or to join in those of the Railroad Companies or to file an acceptance of them. For to relieve the Camden Iron Works from the charge of crime it suffices that none of these things was in fact done."

are in so far as the question at issue is concerned in exact accord with the Hardaway case and with the views we have expressed.

Upon the argument in the Court below counsel for the Government cited U. S. vs. Howell, 56 Fed., 21. Chicago R. R. vs. U. S., 162 Fed., 838; Cisco case, 204 U. S., 449-452 and U. S. vs. N. Y. Cen. & Hudson R. R., 212 U. S., 509, 515; and 157 Fed., 293.

We have no quarrel with either of these decisions. In the Howell case the indictment charges a conspiracy between lumber merchants and an employee of a carrier to obtain less than the established rates by false weighing of the lumber shipped. The indictment was brought under Section 5440 and the tenth section of the Act of 1889 contained in 25 Statutes at Large, 858. Under this tenth section it was made penal to obtain by false weighing, transportation of property at less than the regular rates then established and

in force. It will be observed that the language of this statute is altogether different from that of the Hepburn Act now under consideration. Under the 10th section of the Act of 1889, it is not a condition precedent to criminal liability that the rate be filed and published. It is only necessary that it be **established and in force.** This makes a clear distinction. Clearly posting is not an element of the offense for which Howell was prosecuted, but as that prosecution was under an entirely different statute it is not authority for the construction sought to be given by the Government to the Hepburn Act. As we have before pointed out a distinguishing feature between the penal provisions of the Act of 1889 and the Hepburn Act is that the former is based upon departure by false billing, etc., from a rate "established and in force" while the latter is based upon a departure from a rate which has been "filed and published."

The case of Chicago Railway vs. U. S., 162 Fed., 838, was a case against a carrier for granting a concession. The Court there decided that under the Elkins Act "the substantial elements of the offense are few (1) The granting or giving of a rebate, (2) from the published and filed rates (3) for the transportation of property (4) by a carrier engaged in Interstate Commerce." The Government cites this decision in support of the proposition that the words "published and filed rates" are exhaustive and exclude posting. The decision is sound. It is true it uses the words "published and filed rates" but posting is included in and is a part of publishing. The statement of the Court would have been more accurate if it had quoted the statute and said rates "published and filed as is required by said Act to regulate Commerce and the acts amendatory thereof." Congress was careful to require the publication to be made as required by the statute wherein posting was included as a part of the publication and it was not necessary for the Court to enumerate each element of publication, but when it used the word "published" it was used in the sense of

the statutory definition and included all the elements of publication made necessary by the statute.

As to the Cisco case, 204 U. S., 449, we have already shown that it decided that in a civil case arising under the Act of 1889 the shipper was bound if the rates were established and in force though not posted; that the posting requirement under that act was not a condition precedent to an establishment of the rate. Inferentially it holds that if posting were a condition precedent (as is true of the Hepburn Act in its criminal aspect), the rate which the Court there had under consideration could not have been enforced.

As to the case of U. S. vs. N. Y. R. R., 157, Fed., 293 and 212, U. S., 509. In the first case the Circuit Court held that an indictment under the Elkins Act was defective because it did not allege that the rate alleged to have been violated had been published and filed by the Defendant, though it had been published and filed by another carrier in which rate the Defendant participated. This Court in the last named case upon writ of error reversed the Court below because of the provision in the Elkins Act which is brought forward in the Hepburn Act.

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the Act to regulate Commerce or acts amendatory thereof or participates in rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this act, shall be conclusively deemed to be the legal rate and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of the Act."

Neither of these cases involves the construction of the act in reference to posting. It is established by them that

a carrier which participates in a rate filed or published by another carrier is by virtue of the foregoing clause made liable to the penal provisions of the Statute for any concession granted.

No authority can be found for excluding posting from the definition of publishing as used in the Elkins and Hepburn Acts. They are highly penal statutes and of course must be construed with the greatest strictness. Without violence to the language used, posting cannot be excluded. In the parts of the statute which make the acceptance of concessions penal, the penalty is made conditional upon the publishing of the rate—not publishing in a general sense, but publication as required by the Act. Congress does not leave its meaning as to the word published to mere conjecture and in section 2 of the Hepburn Act it prescribes the method of publication. It makes the posting as much a part of the method of publication as it does the requirement as to the method of printing. In the first sentence it provides that the tariffs shall be kept open to public inspection. In the last sentence it prescribes that they shall be printed and posted in such form that they shall be accessible to the **public** and can be **conveniently** inspected. Surely Congress intended the connection between the first and last sentences which the language necessarily imports.

If Congress had not intended publication as defined by the Act (which definition includes posting) to be a condition precedent to the operation of the penal provisions of the Hepburn Act, it would have used the words "established and in force" as it did in the Act of 1889, 24 St. L., p. 858. Congress intended with reference to the Act of 1906, that the rate upon which its penal provisions were based should be more than established and in force. It intended that for penal purposes the rate should be established by filing and publishing, and provided the method of publication which included posting.

There is good reason for Congress to have made the requirement as to posting. In no other way might the rates be readily accessible to the shipper or open to convenient inspection. As said by the Court below, in its opinion:

> "Now, how valuable is this provision if the shipper whose home is remote from the files of the Interstate Commerce Commission? How valuable to the plain or humble man to whom at times, perhaps, the station agent may not impart the information as to the legal rate as ungrudgingly and cheerfully as he ought to do? If the law as to posting is complied with, the shipper does not need to inquire elsewhere.
>
> "This Court has little regard for unessential technicalities, but this provision for the posting of the rate of interstate transportation near the home of the people is regarded as of inestimable value to the shipping public."

Congress has been most careful to protect the shipper from the penal operation of the Act. It made the shipper criminally liable only where he violated a rate which had been filed and published as prescribed by the statute, but it added the above-quoted provision, to-wit:

> "Whenever any carrier files with the Interstate Commerce Commission or publishes a particular rate under the provisions of the act to regulate commerce or acts amendatory thereof or participates in rates so filed or published, that rate as against such carrier, its officers or agents, in any prosecution begun under this Act shall be conclusively deemed to be the legal rate and any departure from such rate or any offer to depart therefrom shall be deemed to be an offense under this section of the Act."

whereby the carrier is made criminally liable if it violated a rate which has been either filed or published, so that the shipper can only be guilty when he violates a rate which has

been both filed and published as prescribed by the Act, while the carrier is guilty if the rate be filed, but not published or published but not filed. These distinctions made by Congress between the shipper and the carrier are significant. It was not necessary for Congress to provide requirements for the knowledge of the carrier. If it filed a rate the carrier knew what was in it, but as to the shipper it was most necessary to make and enforce requirements which would enable him to learn the rates, learn them himself by opportunity for convenient inspection, not second-hand from an agent of the carrier, consequently Congress required the carrier to print its schedules in large type and post them in each office where business is transacted and in such manner that they are "accessible to the public and can be conveniently inspected." This was done for the purpose of giving opportunity for information to the shipper and he was only made liable if he violated a rate as to which the carrier has done its full duty as to filing and publication, while on the other hand the carrier is penalized if it did not file and publish the rates as required by the Acts and also if it violated a rate which has been either filed or published—not in the manner required by the Acts—but published in any manner.

Upon the argument in the Court below, counsel for the Government contended that a construction of the Act which required posting of a rate as a condition precedent to criminality would be unreasonable as it would then be incumbent upon the Government in order to make out a case to prove posting at every office at which freight was received. We think this contention without merit, and that the Court below adopted the rational view, when it held that the provision was a relative one, and that its conditions would be satisfied if proof of posting at the office at which the freight in question was received were made. It is a reasonable requirement that the rate be so posted that the shipper may have access to it, and it is not unreasonable to require the Government to allege and prove that the rates were so posted at the office where the freight was received that the indicted shipper had

an opportunity to conveniently inspect the same. It would be an unreasonable construction to strike this useful condition from the statute. All rules provide for a reasonable construction of a statute, but no rule permits a plain provision of a statute to be stricken and nullified merely because it is inconvenient for one party to comply with it; especially is this true where a reasonable and rational construction may be given, whereby the intent of Congress may be carried out and neither party suffer inconvenience.

We think the history of the Interstate Commerce Act as to its penal features will show an intention upon the part of Congress to make posting of a rate an essential element of the offense for which Defendants are indicted. The original Act made no provision for criminal offenses against shippers. The Act of 1889 provided that a shipper who by a fraudulent device procured a reduction from a rate which was established and in force, should be guilty of a crime. The Elkins Act (the Hepburn Act is as to this question identical) created an offense which involved no element of fraud, so that a person accepting a concession would be guilty of a crime though he were innocent of fraudulent act or intent. Armour Packing Company, 209 U. S. pp. 69-71. The Act of 1889 made a fraudulent departure from an established rate a crime. The Elkins and Hepburn Acts make a knowing but innocent departure from a filed and published rate a crime. They make posting a part of the publication. Why this difference between an established rate and a filed and published rate? Is it not that the fraud which was involved under the Act of 1889 necessarily involved knowledge of the rate, so that it was unnecessary to make posting or other publication an essential? While under the later Acts wherein fraud is not an element it was deemed essential to provide every opportunity for information by requiring publication by printing and by posting so that the shipper should have ready and easy access to the rate, a departure from which would subject him to a heavy penalty.

Is not this the intention which this Court discovered when reviewing the foregoing acts in Armour Packing Co. vs. U. S., 209 U. S. p. 72, it said:

> "That the only rate charged to any shipper * * * should be the one established, published and posted as required by law." * * *

Clearly the only reasonable construction which can be given to the statute is that contended for by ourselves and adopted by the Court below. The clear intention of Congress was to make the shipper guilty of a crime only in the event that he violated a rate which he knew had been filed, and published (published by keeping open to public inspection), by printing and posting in such manner that it shall be accessible to the public and can be conveniently inspected. Without violence to the language used, can any other intention be discovered?

Clearly the Court below was correct in holding that posting was a part of the publication and we respectfully insist that its judgment should be affirmed.

Respectfully submitted,

M. HAMPTON TODD,
WILLIAM W. OSBORNE,
ALEXANDER A. LAWRENCE,
*Attorneys for Defendant in Error.*

# UNITED STATES v. MILLER.

# SAME v. SAME.

ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF GEORGIA.

Nos. 607, 608. Argued January 9, 1912.—Decided February 26, 1912.

Posting of rates as required by § 6 of the Interstate Commerce Act is not a condition of making the tariff legally operative or keeping it in operation.

The non-posting of rates by an interstate carrier will not relieve a shipper from the penalty for violating the Interstate Commerce Act by accepting rebates.

Publication and posting, in the sense in which those terms are used in the Interstate Commerce Act, are essentially different.

One provision of an act will not be so construed as to defeat the object of the act; and the non-posting, or removal of, schedules of rates, will not disestablish a published rate.

Congress will not be presumed to have intended that the mere non-posting of schedules of rates in the depots of carriers, or the removal thereof after posting, should disestablish or suspend a rate, which the act provides shall only be changed in the mode prescribed. *Kansas City Southern Ry. Co.* v. *Albers Commission Co.*, *ante*, p. 573.

THE facts, which involve the construction of certain provisions of the Interstate Commerce Law as amended by the Hepburn Act of 1906 to regulate commerce, are stated in the opinion.

*The Solicitor General* for the United States:

Where the carriers have done everything prescribed by the statute with regard to a through joint rate for transportation over a through route under a common arrangement, except posting the schedules in the depots, a shipper who knows what the established rate is, is guilty of a vio-

lation of § 1 of the Elkins Act as amended by the Hepburn Act if he knowingly solicits, accepts, and receives a concession from that rate.

Proof of a violation of the act by a shipper would be rendered practically impossible, and certainly senselessly difficult, laborious, and expensive, if in every prosecution primary evidence of posting the schedules and keeping them posted in every depot were required. The shipper indeed might secure immunity by himself removing the schedule from some depot before applying for and getting his concession, as the established rate would then no longer be in existence.

Every purpose of the law would be defeated if rates existed by so precarious a tenure.

The question has in effect been determined in *Texas and Pacific Ry. Co.* v. *Cisco Oil Mill*, 204 U. S. 449. Although that case concerns the construction of the section in a civil cause, that affords no reason for saying that the authoritative construction of the statute is not to be applied in a criminal case. *United States* v. *Keitel*, 211 U. S. 370, 392.

As early as 1892, in *United States* v. *Howell*, 56 Fed. Rep. 21, 29, it was held as against shippers that the posting of rates in the depots was not essential to their establishment.

In no Federal case, other than the one at bar, has the posting in depots been held essential to the establishment of the rate.

The amendments made to the law since the *Cisco Case* was decided were not designed to weaken it, but to guard it more carefully than before against rebates, concessions, and discriminations.

In this case there is charged in the indictment a rate established by the carrier, knowledge by the defendants of what the rate was, and the solicitation and acceptance of a lesser rate.

The requirements of the statute have been fulfilled, and the indictment should be sustained.

*Mr. Alexander A. Lawrence*, with whom *Mr. M. Hampton Todd* and *Mr. William W. Osborne* were on the brief, for defendant in error:

An indictment of a shipper for accepting a concession from a freight rate is properly quashed when there is no averment therein that the rate in question had been posted in the freight station where the freight was received or elsewhere.

As a condition of criminality, the statute prescribes that the shipper must violate a tariff rate published as prescribed by the act. The act prescribes as a part of the publication that the tariffs should be posted in two conspicuous places where freight is received. It is admitted that the rates alleged to be violated were not so posted. Where the statute prescribes a method of publication the Government may not in order to secure a conviction allege and show that it had been published only in part. *Texas Railway Co.* v. *Cisco Oil Mill*, 204 U. S. 449; *Armour Packing Co.* v. *United States*, 209 U. S. 72.

Neither the *Cisco Case*, *supra*, nor the *Abilene Cotton Co. Case*, 204 U. S. 437, construed the penal provisions. While neither the filing nor publication of the rate is a condition precedent to its establishment, validity, or effectiveness from a civil standpoint, both filing and publishing are, under the Hepburn Act, conditions precedent to the penal operation of the statute with respect to the shipper.

The distinction between an established and a published rate and the consequences of a departure therefrom by a shipper are clear. See *Hardaway* v. *State*, 1 Ga. App. 150.

The omission of an essential allegation is fatal to the indictment. *United States* v. *Cook*, 17 Wall. 174; *United States* v. *Wood*, 145 Fed. Rep. 409; *Camden Iron Works* v. *United States*, 158 Fed. Rep. 564.

Counsel for the Government cited *United States* v. *Howell*, 56 Fed. Rep. 21; *Chicago R. R.* v. *United States*, 162 Fed. Rep. 838; *The Cisco Case*, 204 U. S. 449, 452, and

*United States* v. *N. Y. Cent. & Hudson R. R. R.*, 212 U. S. 509, 515, and 157 Fed. Rep. 293, but neither of these cases involves the construction of the act in reference to posting. It is established by them that a carrier which participates in a rate filed or published by another carrier is by virtue of the act made liable to the penal provisions of the statute for any concession granted.

MR. JUSTICE VAN DEVANTER delivered the opinion of the court.

These were indictments under that provision of the act to regulate commerce, June 29, 1906, 34 Stat. 584, c. 3591, which makes it a misdemeanor for a shipper knowingly to solicit, accept or receive, from any common carrier subject to the act, a rebate or concession whereby property is transported in interstate commerce "at a less rate than that named in the tariffs published and filed by such carrier, as is required by said act;" and the question presented for decision is, whether compliance with the requirement in respect of the posting of tariffs in the depots, stations or offices of the carrier is essential to bring a tariff within the descriptive terms of that provision. We say this is the question for decision, because it appears from the record that the Circuit Court, in sustaining demurrers to the indictments, placed its decision solely upon the ground that they did "not allege that the schedules and tariffs alleged to have been violated were posted in the manner required by law," and because upon these direct writs of error we must accept that court's interpretation of the indictments and confine our review to the question of the construction of the statute involved in its decision. *United States* v. *Keitel*, 211 U. S. 370, 398; *United States* v. *Kissell*, 218 U. S. 601, 606.

That the act imposes upon common carriers subject to its provisions the duty of establishing in a prescribed mode the rates, whether individual or joint, to be charged for

the transportation in interstate commerce of property over their lines, and that the rates so established are obligatory alike upon carrier and shipper, and must be strictly observed by both until changed in the mode prescribed, are propositions which are not only plainly stated in the act, but settled by repeated decisions of this court. In speaking of the rates which must be thus observed, the act variously designates them as the rates "named in the tariffs published and filed," the "charges which have been filed and published," the "charges which are specified in the tariff filed and in effect at the time," the "regular charges . . . as fixed by the schedules of rates provided for in this act," and the "regular rates then established and in force," but in none of these expressions is there any suggestion that posting is a necessary step in establishing rates, that is, in making them legally operative. Of course, these expressions, although differing in words, are identical in meaning, and to ascertain that meaning recourse must be had to § 6 of the act, which, at the time of the offenses charged in these indictments (1907–8), declared:

"SEC. 6. That every common carrier subject to the provisions of this Act shall file with the Commission created by this Act and print and keep open to public inspection schedules showing all the rates, fares, and charges for transportation between different points on its own route and between points on its own route and points on the route of any other carrier by railroad, by pipe line, or by water when a through route and joint rate have been established [meaning adopted]. . . . Such schedules shall be plainly printed in large type, and copies for the use of the public shall be kept posted in two public and conspicuous places in every depot, station, or office of such carrier where passengers or freight, respectively, are received for transportation, in such form that they shall be accessible to the public and can be conveniently in-

spected. . . . *Provided*, That the Commission may, in its discretion and for good cause shown, . . . modify the requirements of this section in respect to publishing, posting, and filing of tariffs, either in particular instances or by a general order applicable to special or peculiar circumstances or conditions. . . . No carrier, unless otherwise provided by this Act, shall engage or participate in the transportation of passengers or property, as defined in this Act, unless the rates, fares, and charges upon which the same are transported by said carrier have been filed and published in accordance with the provisions of this Act. . . ."

It is the contention of the defendants that a tariff is not published in the sense in which the act uses that term unless printed copies are "kept posted in two public and conspicuous places in every depot," etc., and it was this contention that prevailed in the Circuit Court. But, in our opinion, it is not sound. Publication and posting in the sense of the act are essentially distinct. This is the import of the provision that the requirements relating to "publishing, posting and filing" may be modified by the commission in special circumstances, for if publishing included posting, mention of the latter was unnecessary. And from all the provisions on the subject it is evident that the publication intended consists in promulgating and distributing the tariff in printed form preparatory to putting it into effect, while the posting is a continuing act enjoined upon the carrier, while the tariff remains operative, as a means of affording special facilities to the public for ascertaining the rates in force thereunder. In other words, publication is a step in establishing rates, while posting is a duty arising out of the fact that they have been established. Obviously, therefore, posting is not a condition to making a tariff legally operative. Neither is it a condition to the continued existence of a tariff once legally established. If it were, the inadvertent or mischievous destruction or

removal of one of the posted copies from a depot would disestablish or suspend the rates, a result which evidently is not intended by the act, for it provides that rates once lawfully established shall not be changed otherwise than in the mode prescribed.

Like views of the posting clause were expressed in *Texas and Pacific Railway Co.* v. *Cisco Oil Mill*, 204 U. S. 449, and upon further consideration we perceive no reason for departing from them. See also *Kansas City Southern Railway Co.* v. *Albers Commission Co.*, *ante*, p. 573.

Whether, by failure to comply with that clause, a carrier becomes subject to a penalty is apart from the present case and need not now be considered.

The judgments are reversed, and the cases are remanded for further proceedings in conformity with this opinion.

*Reversed.*